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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 295

H. P. WELCH COMPANY, APPELLANT,

vs.

THE STATE OF NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

FILED AUGUST 22, 1938.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1938.

[fol. 1] **IN SUPREME COURT OF NEW HAMPSHIRE**

1938 Term

H. P. Welch Company, Appellant,

v.

The State of New Hampshire, Appellee

Agreed Summary of Proceedings

The Public Service Commission of The State of New Hampshire on April 13, 1937 issued to the appellant, H. P. Welch Company, an order to show cause "why its common and contract carrier certificates should not be suspended or revoked by reason of alleged violations of the Laws of 1933, c. 106, s. 8." In accordance with the terms of the order, a hearing was thereafter held at Concord on May 10, 1937, at which the appellant appeared.

From the testimony at the hearing it appeared that the appellant is a corporation organized under the laws of Massachusetts, doing both an interstate and intrastate business as a common and contract carrier of freight by motor vehicle over public highways in Massachusetts and New Hampshire. The appellant as a common and contract carrier, pursuant to the provisions of Chapter 106, Laws of 1933, in 1937 registered twenty trucks with the Commission. The appellant has terminals at Boston in Massachu-
[fol. 2] setts, and at Manchester, Concord, and Claremont, in New Hampshire, and approximately ninety-nine per cent of its business is interstate. The hours of service records filed by employees of appellant showed in several instances of an elapsed time greater than twelve hours on duty. The records of Philip Chevrette indicated that his regular time to report for duty was from 7 to 7:30 A. M., but earlier and later calls were shown. Chevrette was principally engaged in operating a motor truck from Manchester into Boston, making a round trip each day. On January 11, 1937, his return showed that he was on duty from 3:15 A. M. to 8:40 P. M., except for a relief of forty-five minutes at Boston between 5:30 and 6:15 P. M. He reported for duty at 7:15 A. M. the following morning, January 12, but was released at 9:50 A. M. His returns also showed that on January 25

he was on duty from 7:20 A. M. to 11:45 A. M., and on January 26 from 1:15 A. M. until 6 P. M. No emergency was claimed in connection with these operations.

The returns showed similar instances of continuous employment in excess of twelve hours for Roland Rousseau operating a motor truck over a loop route out of Manchester by the way of Lawrence, Lowell and Nashua and [fol. 3] for A. Demers operating a motor truck from Manchester into Boston and return. The specific findings of the Commission that appellant's employees had operated trucks for longer periods than permitted by sect. 8, Ch. 106, Laws 1933 was warranted by the evidence. In all the operations in which the alleged violations occurred there were being carried on the trucks some interstate shipments, but it was the practice of the appellant to carry intrastate shipments on the same trucks.

The Commission by report and order filed as of December 11, 1937, held that the appellant had violated the provisions of the Laws of 1933, section 8, Ch. 106, and ordered that any and all registration certificates issued by the Commission to the appellant—"to lawfully transport property for hire in motor vehicles between points within this state either as a common or contract carrier be" suspended for a period of five days. The appellant thereupon seasonably moved for rehearing which was denied December 22, 1937. The appellant filed its appeal with the Supreme Court of New Hampshire, alleging among the grounds for the appeal, the following:

[fol. 4] "1. The statute prescribing maximum hours of labor (Sect. 8, Ch. 106, Laws 1933) upon which said report and order are based does not apply equally to all owners and drivers of motor vehicles operated for the transportation of property on the highways of this state. It applies only to owners and drivers operating motor vehicles for the transportation of property for hire and discriminates against them by imposing burdens and restrictions which are not applicable to other owners and operators of motor vehicles engaged in the transportation of property on the highways of this state. The statute denies to the H. P. Welch Company the equal protection of the laws guaranteed by the Bill of Rights and the Constitution of New Hampshire and by the Fourteenth Amendment to the Constitution of the United States and is of no force and effect.

"2. The alleged violations of said statute (Sect. 8, Ch. 106, Laws 1933) and of Rule 4n occurred while the said H. P. Welch Company and its employees were engaged in interstate commerce. The power to regulate interstate commerce is by the Constitution of the United States (Sect. 8, Art. 1) vested in the Congress, which has exercised this power as to motor carriers engaged in interstate commerce by the "Motor Carrier Act, 1935", which, with the regulations made pursuant thereto, supersedes said Ch. 106, as amended by Ch. 169, Laws of 1933, in so far as the provisions thereof might apply to interstate commerce."

The Supreme Court by opinion and order handed down June 7, 1938, dismissed the appeal. The motion for rehearing filed by the appellant was denied June 21, 1938.

Robert W. Upton, Attorney for Appellant. Dudley W. Orr, Attorney for Appellee.

Approved: John E. Allen, Chief Justice of the Supreme Court of New Hampshire.

[fol. 5] In Supreme Court of New Hampshire

Docket Entries

2966

Appeal of H. P. Welch Company from Public Service Commission

Robert W. Upton, for Welch Company.
Dudley W. Orr, Special Counsel for Public Service Commission.

Public Service Commission Appeal

Entered December 23, 1937

Dec. 24, 1937. Order of suspension sustained.
June 7, 1938. Woodbury, J., Appeal dismissed (opinion).
June 20, 1938. Motion for rehearing filed.
June 21, 1938. Motion denied.
July 14, 1938. Appeal to U. S. Supreme Court allowed.
July 29, 1938. Motion to dismiss by appellee filed.
A true copy. Attest:

George O. Shovan, Clerk of the New Hampshire Supreme Court.

[fol. 6] BEFORE PUBLIC SERVICE COMMISSION OF NEW HAMPSHIRE

D—T1837

H. P. WELCH COMPANY

Re Hours of Service Record

Common and contract carriers—Jurisdiction:

1. It appearing that the Federal authority extends to the safety of the employees in industry as well as to safeguard the transportation of passengers or goods in transit, the State would not be deprived of the power and authority to safeguard its citizens or their property engaged in no way in the furtherance of or the conduct of the carrier industry involved.

Common and contract carriers—Hours of Service Records —Constitutionality:

2. It appearing that the business of transporting property for hire is in effect engaging in the business of a public utility, such utility being the object of special regulations, certain rules were prescribed by the Commission covering Hours of Service Records.

Common and contract carriers—Violation of Act—Interpretation of statute:

3. Hours of Service Records covering operation over routes wholly within the State not having been filed, show violation of Rule of the Commission and of the orders making such rule effective; the interpretation of the statute being that a driver having been on duty 12 hours, even if in another State for all or a greater portion of that time, violates the law if he operates on the highways of one State, subsequent to the 12-hour tour of duty without a three or an eight hour rest period.

Common and contract carriers—Authority of Commission to prescribe rules:

4. The rules and regulations promulgated, not exceeding the authority granted by the statute, would appear to be a

reasonable means by which the Commission could carry out its duty of enforcing the Law, therefore, rules and regulations are reasonable methods by which the legislative purpose can be carried out.

Common and contract carriers—Hours of Service Record—Failure to comply with Laws of the State and requirements of the Commission—Revocation of certificates:

5. It appearing, after investigation, that a company operating trucks in the transportation of property for hire had violated the Laws of the State of New Hampshire and rules of the Commission with regard to Hours of Service Record, the certificates permitting said Company to operate as either a common or contract carrier were suspended for a period of five days.

[fol. 6-1] Appearances:

For the H. P. Welch Company, Robert Upton and Laurence Duncan.

For the State of New Hampshire, Dudley Orr.

REPORT—Filed December 11, 1937

SWAIN, Commissioner:

By order of the Commission dated April 13, the H. P. Welch Company was ordered to show cause why its common and contract carrier certificates should not be suspended or revoked by reason of alleged violations of the Laws of 1933, c. 106, s. 8, and of Rule 4n of Circular No. 2 of the Commission's Administrative Rulings. Hearing was held at Concord, May 10, 1937 and briefs were filed, all of which were received by June 30.

The law provides that:

"It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least

eight consecutive hours off duty. * * * Periods of release from duty herein required shall be given at such place and under such circumstances that rest and relaxation from the strain of the duties of the employment may be obtained. No period off duty shall be deemed to break the continuity of service unless it be for at least three consecutive hours at a place where there is opportunity for a rest. In case of an unforeseen emergency the driver or chauffeur may complete his run or tour of duty if such run or tour of duty, but for the delay caused by such emergency, would reasonably have been completed without a violation of this section. Provided, however, that the provisions of this section shall not apply to trucks while under the control of two licensed operators. The Commission shall have authority to enforce the provisions of this section."

[fol. 6-2] That portion of Rule 4n which is in issue reads:

"Each driver shall carry while on duty a record of his tour of duty on forms to be furnished by the Commission. Such record shall show the date and time at which the driver began and completed his tour of duty, and whether one or more licensed operators were on the vehicle at the same time for each day shown. Entries shall be made at the time such events occur, to cover calendar months. At the end of each month the record for each driver shall be forwarded to the Commission. A similar record shall be maintained at the home terminal by the carrier. The Commission may revoke the registration certificate of a carrier employing a driver without proper entries in such record."

This provision was made effective by Order No. 2560 dated August 1, 1933 and Order No. 3101 dated July 11, 1936.

A number of Hours of Service records were introduced in evidence showing an elapsed time of greater than twelve hours on duty. The record of Phil Chevrette, 121 Alsace Street, Manchester is an example. Although the regular reporting time for duty appears to be from 7 A. M. to 7:30 A. M. occasional earlier and later calls to duty evidently are made. On January 11, 1937, time on duty began at 3:15 A. M. and ended at 8:40 P. M. The only release shown is for 45 minutes at Boston between 5:30 P. M. and 6:15 P. M. Chevrette reported as usual at 7:15 A. M. the next morning January 12, but was released at 9:50 A. M. pos-

sibly because of overtime duty on the 11th. No rest period of either three or eight hours is shown at Boston following the 12-hour tour of duty. No emergency report was submitted. Evidently there was a violation of the New Hampshire Law from the time the driver reached the State line until he was relieved at Manchester. Incidently the Massachusetts law appears to have been violated from 3:15 P. M. until Chevrette reached the State Line. A somewhat similar violation is shown on January 26 with a tour of duty from 1:15 A. M. until 6 P. M. although the short day preceded rather than followed the long tour of duty, as on the 25th Chevrette worked only from 7:20 A. M. to 11:45 A. M. [fol. 6-3] Chevrette's regular run is between Manchester and Boston.

Similar violations are shown for Roland Rousseau, 363 Spruce Street, Manchester, regularly operating a loop route, Manchester via Lawrence, Lowell, and Nashua, and for A. Demers, 156 Lake Avenue, Manchester, operating between Manchester and Boston.

Although the respondent registered 20 trucks with the Commission as common and contract carrier trucks, only a few Hours of Service Records have been filed with the Commission. Among the drivers failing to file records are Osgood, operating between Concord and Laconia with occasional trips to Plymouth, Hook, operating between Claremont and Sunapee, and Buzwell, operating between Claremont, Lebanon, and Hanover.

The evidence is conclusive that both the statute and the Commission's Rule 4n as made effective by orders previously referred to have been violated. The respondent had been notified as to the Law and the Rules, by general notices, letters and by conference, and in fact admits requesting drivers to fill in and file Hours of Service Records. As the drivers are paid on an hourly basis, the respondent has knowledge of hours worked in excess of 12.

The respondent does not deny that its drivers occasionally work in excess of 12 hours. Further, the respondent does not deny that the drivers employed violated Rule 4n by failing to file Hours of Service Records. Although responding to a show cause order, no attempt was made to rebut or explain the Hours of Service Records of the employees with claims of emergency operation or other information available to the Company.

On brief the respondent argues:

1. The Commission is without jurisdiction to enforce the Act as against the H. P. Welch Company because it is engaged in interstate commerce.

2. Provisions of the Law of 1933, Chapter 106 are discriminatory and the act unconstitutional.

[fol. 6-4] 3. The evidence does not establish violation of the act by the company.

4. The Rules and Regulations issued by the Commission are unauthorized by the statutes, the company certificates may not be revoked or suspended for violation of such rules, and the evidence does not establish violation by the company.

These matters will be considered as above set forth for the reply of the State thereto.

Jurisdiction

1 The evidence clearly shows that the H. P. Welch Company is engaged in both interstate and intrastate commerce. It is alleged by the Company that approximately 99% of the traffic handled is interstate and approximately 1% intrastate. The Company argues that following the enactment by Congress of the Motor Carrier Act, 1935, vesting jurisdiction in the Interstate Commission, the State Law became inoperative as to carriers engaged in interstate commerce. Section 204 (a) of the Federal statute provides:

"Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records. qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of

records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

It is to be noted that the Federal statute grants authority to fix the maximum hours of service of all employees. The State law does not attempt to fix the maximum hours of [fol. 6-5] service of any employee, but makes it unlawful to operate on the State's highways after a 12-hour period on duty. There is nothing in the State Law to prevent a driver working in a warehouse after a 12-hour tour of duty as only operation on the highway is restricted.

The purposes of the two provisions differ widely. Congress acted on that matter over which it clearly has authority—interstate commerce. The thing to be protected is that which is transported. The Federal Act does not mention highway safety generally, but restricts the provisions to safety of operation and equipment of vehicles engaged in interstate commerce. The State law is designed under the police powers of the State to protect the lives and property of all those who use its highways.

If the argument of the respondent is sound, then as the Federal statute provides for reasonable requirements as to "safety of operation and equipment" interstate carriers are now free to run without lights, brakes, etc., to run through red lights, ignore all local and State speed restrictions, pass cars on hills, and violate all other State laws and City and Town ordinances governing safety of operation and equipment. Here, also, although the Interstate Commerce Commission will be concerned with that which is to be transported interstate, the State is concerned with the safety of all those who use its highways. In support of its position respondent cites University Overland Express, Inc. v. Alsop, et al., (Conn.) 189 Alt. 458, where the Court said:

"But a state regulation in respect to a branch of interstate commerce covering the same ground as a rule lawfully prescribed by or under authority of Congress 'will cease to have any force whether formally abrogated or not.' And the regulations prescribed by or under authority of Congress 'will alone control'. Reid v. Colorado, 187, U. S. 137, 146; 23 S. Ct. 92, 96; 47 L. Ed. 108.

"To come in conflict with a law enacted by Congress or a regulation promulgated pursuant to it, the provisions of

a state law or regulation, to be superseded by it, need not necessarily be in opposition or repugnant thereto. 'When [fol. 6-6] Congress sees proper to act with respect to any particular branch of interstate or foreign commerce, State regulations in conflict therewith or acting upon the same subject are thereby superseded.' 5 R. C. L. p. 704. 'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition.' Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 604, 35 S. Ct. 715, 717, 59 L. Ed. 1137, Ann. Cas. 1916D, 333. 'The elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme' (Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 435, 33 S. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203) 'and exclusive.' Missouri Pacific R. Co. v. Stroud, 267 U. S. 404, 408, 45 S. Ct. 243, 245, 79 L. Ed. 783; Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, 101, 46 S. Ct. 279, 283, 70 L. Ed. 482.

"To have the effect of superseding a state statute or regulation, the federal law may either expressly cover the precise subject-matter or show a purpose to take legislative possession of the whole field. (12 C. J. p. 18). To the extent that Congress does occupy the field of legislation existing state legislation within the scope of such occupation is superseded and further legislation prevented. 'The test • • • is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control.' Southern Ry. Co. v. Railroad Commission of Indiana, 236 U. S. 439, 446, 448, 35 S. Ct. 304, 306 59 L. Ed. 661. 'Congress having entered this field of regulation it follows from the paramount character of its authority that state regulation of the subject-matter is excluded.' Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 41, 36 S. Ct. 482, 484, 60 L. Ed. 874. 'In a case where • • • the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent, but only permissive power.' Chicago, R. I. & P. Ry.

Co. v. Hardwick Farmers' Elevator Co., supra, 226 U. S. 426, at p. 435, 33 S. Ct. 174, 176, 57 L. Ed. 284, 46 L. R. A. [fol. 6-7] (N. S.) 203; Adams Express Co. v. Croninger, 226 U. S. 491, 505, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Northern Pacific Ry. Co. v. Washington, 222 U. S. 370, 378, 32 S. Ct. 160, 56 L. Ed. 237; 12 C. J. p. 15."

The respondent further cites Northern Pacific Railway Company v. Washington, 222 U. S. 370; 56 L. Ed. 237 a case involving the hours of service of railway employees wherein the Supreme Court said:

"But we are of the opinion that this view is not compatable with the paramount authority of Congress over interstate commerce. It is elementary * * * that the right of a state to apply its police power for the purpose of regulating interstate commerce in a case like this exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state."

See also, Pennsylvania Railroad Company v. Public Service Commission, 250 U. S. 566; 63 L. Ed. 1142.

Respondent further argues that even though the Interstate Commerce Commission has not yet prescribed rules and regulations pursuant to the authority conferred upon it by the Motor Carrier Act yet the regulations of hours of labor is none the less removed from the jurisdiction of the State by that enactment and cites as authority, Missouri P. R. Co. v. Porter, 273 U. S. 341, 71 L. Ed. 672, Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 71 L. Ed. 432 and Oregon and Washington R. R. and N. Co. v. Washington, 270 U. S. 102; 70 L. Ed. 482. The respondent urges that in view of these decisions the Commission is without jurisdiction to revoke the certificates covering the intrastate operation of the H. P. Welch Company as such Company is also engaged in interstate Commerce.

[fol. 6-8] Although the State has not attempted to fix the hours of labor of employees but only restricts the operation

on the highways of the State of a driver who has been on duty 12 hours, by making such operation unlawful, the State in support of its position cites Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 34 S. Ct., 790, the Court said (page 793):

"These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In Reid v. Colorado, 187 U. S. 137, 148, 47 L. Ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harland, said: 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243, 247. In Savage v. Jones, 225 U. S. 501, 533, 56 L. Ed. 1182, 1194, 32 Sup. Ct. Rep. 715, the court said: 'When the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to the regulation of Congress within the sphere of its delegated power (citing cases). But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to [fol. 6-9] circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.' (Citing many cases.)"

The State further points out that the Motor Carrier Act merely authorizes the Interstate Commerce Commission to establish reasonable requirements with respect to qualifications and maximum hours of service employees. The act does not in fact and of itself establish such reasonable requirements.

In the case of Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 29 S. Ct. 214, the Court said (Page 218):

"On the other hand, it is said that Congress has already acted,—has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has intrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can, in advance, anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

See also Southern R. Co. v. Reid, 222 U. S. 424, 32 S. Ct. 140; Atlantic Cl. R. Co. v. Georgia, 234 U. S. 280, 34 S. Ct., 829, and Missouri K. & T. R. Co. v. Harris, 234 U. S. 412, 34 S. Ct. 790.

[fol. 6-10] In Northern Pac. Ry. v. Washington, 222 U. S. 370; 56 L. Ed. 237; 32 S. Ct. 160 the statute to be construed in and of itself forbad hours of service on railway trains in excess of 16 hours in any 24. No such express regulation is contained in the Motor Carrier Act, 1935. Further, railroads operate their trains over rights of way owned by them. All motor carriers operate over highways owned by the

State and built and maintained from taxes contributed by its citizens.

In many cases the United States Supreme Court has held a variety of State regulations, similar to the one now under attack, to be constitutional. Registration of vehicles and licensing of operators, Hendrick v. Maryland, 235 U. S. 610; 59 L. Ed. 385; 35 S. Ct. 140. The requirement of an appointment of an agent for service of process in actions arising out of the use of the highways, Kane v. New Jersey, 242 U. S. 160; 61 L. Ed. 222; 37 S. Ct. 30; Hess v. Pawloski, 274 U. S. 352; 71 L. Ed. 1091; 47 S. Ct. 632. Uniform regulations limiting weights and dimensions of vehicles, Morris v. Duby, 274 U. S. 135; 71 L. Ed. 966; 47 S. Ct. 548; Sproles v. Binford, 286 U. S. 374; 76 L. Ed. 1167; 52 S. Ct. 581. Requirements of a bond or insurance to secure the public against loss from personal injuries or property damage, Hicklin v. Coney, 290 U. S. 169; 78 L. Ed. 247; 54 S. Ct. 142; Sprout v. South Bend, 277 U. S. 163; 72 L. Ed. 833; 48 S. Ct. 502.

The State further argues that for the purpose of protecting State property, State legislation will be valid as against the commerce clause that might otherwise be unconstitutional, Geer v. Conn., 161 U. S. 519; 40 L. Ed. 793; 16 S. Ct. 600; New York v. Hesterberg, 211 U. S. 31; 53 L. Ed. 75; 29 S. Ct. 10.

Continuing, the State argues:

"The point need not be labored that the interest of the state in its highways is one of the first importance. The enormous sums spent annually for the construction and maintenance of them are matters of common knowledge. [fol. 6-11] The ever increasing burden of traffic over them with its concomitant effect on the health and welfare of the citizens of the state is a subject of constant discussion. If the power of the legislature of the State of New Hampshire has been confined within the narrow limits that respondent claims then the sovereignty of the state over one of the most important aspects of our lives has disappeared and the power of regulating our affairs resides only in a remote and omnipotent federal government. If Congress may regulate the hours of service and qualifications of drivers it may also regulate the manner and method of operation by interstate carriers. If the Interstate Commerce Commission should adopt a rule that henceforth interstate carriers should bear

to the left, of necessity all intrastate motor traffic would follow suit. The federal statute now before the commission does not produce this outrageous consequence. A much more forthright declaration of congressional intent should be necessary to warrant this abrupt curtailment of state sovereignty.

"In view of the state interest in the protection of state owned highways from abuse, any conflict between state and federal legislation must be clear, direct and positive to require application of the rule that congressional action governing interstate commerce will supersede state regulations in the same field."

See Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412; 34 S. Ct. 790.

Whether or not these acts can be reconciled is not for this Commission to determine. The Motor Carrier Act, 1935 clearly recognizes the interests of the states in the matter of motor vehicle regulation. Under it many questions are to be decided in the first instance by Joint Boards composed of a representative from each State through which the interstate carrier operates. Section 221 of the act dealing with Orders, Notices, and Service of Process further carries out the theory of cooperation between the Federal and the State authorities. Under the declaration of policy and delegation of jurisdiction as contained in the Motor Carrier Act, 1935, [fol. 6-12] there is evidence that Congress sought to avoid conflicts of State and Federal authority. Section 202 (c) reads:

"(c) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Although we have discussed at length the contentions of the respondent and the State, we have no authority to consider as controlling to this Commission the conflicting question of jurisdiction. We are authorized by the legislature to suspend or revoke the certificates under which either an intrastate or interstate carrier may lawfully transport intrastate commerce for violation of the hours of service pro-

visions of Chapter 106. This we propose to do unless prevented by proper authorities. The suspension or revocation of authority to do intrastate business of carriers who are also interstate carriers for violations of the State law may have the effect of providing two sets of carriers operating on the highway, those doing solely an interstate business and those doing solely an intrastate business. Generally speaking, the routes covered by interstate carriers in the State are also covered by intrastate carriers so that there is available to shippers of intrastate traffic, service even though the interstate carriers discontinue handling intrastate commerce. This intrastate commerce is incidental business for the interstate carriers where authorized to handle such commerce, and is presumably handled at little added expense.

If, as respondent claims, the fact that a carrier is an interstate carrier ousts the State of jurisdiction as to all regulation of such carriers, even as to the intrastate commerce handled by such carrier, then it would appear necessary that the States refuse to authorize intrastate rights to any carrier also engaged in interstate commerce, in order that [fol. 6-13] the State regulations may be effective. Contrary to the rail situation as to the volume of interstate traffic versus intrastate traffic, intrastate motor vehicle traffic is conceded to exceed the interstate traffic.

In our opinion it is evident that the Federal authority extends to the safety of the employees in the industry as well as safeguarding the transportation of passengers or goods in transit. This does not deprive the State of the power and authority to safeguard its citizens or their property engaged in no way in the furtherance of or the conduct of the carrier industry here involved. If this position is false then all State regulations looking to the protection of highway travelers and their property are of no avail. In this respect railroad crossing protection and like regulations must fall by the wayside as in conflict with Federal authority exercised over Railroad operation.

Furthermore, as before stated, neither at the time of the violation, nor when the hearing was held, had the Interstate Commerce Commission in fact acted under the grant of authority to prescribe rules regulating hours of service, nor has it done so at the present time despite the passage of more than two years, since the enactment of the statute.

Thus we are confronted by an argument which, in this respect and under the circumstances, relies upon an unutilized Federal statute intended to provide control as the basis for securing not only relief from the police power of the State, but also, in fact from all regulations in the field. This in our opinion would produce an absurd result.

Constitutionality

2. The respondent argues that the provisions of Chapter 106 are discriminatory and that hence the Act is unconstitutional. The Company claims, in effect, that the selection of carriers for hire to which the hours of service regulations apply results in a classification for purposes of regulation which is unreasonable. It cites the Opinion of the Justices, 85 N. H. 564:

[fol. 6-14] "Classification to be valid must reasonably promote some proper object of public welfare or interest and may not be sustained when the selection and grouping is so arbitrary as to serve no useful purpose of a public nature."

The Company points to the fact that firms or corporations transporting products of their own manufacture or labor are exempt. They argue that no reasonable basis for this exemption is apparent in a law manifestly designed to promote the safety of highways. The Company further claims that the Act creates an arbitrary classification which is unreasonable with reference to the purposes of the statute. In support of its position the Company cites Woolf v. Fuller, 87 N. H. 64, 72, Bliss' Petition, 63 N. H. 135; State v. Wiggin, 64 N. H. 508.

The State claims that Chapter 106 does not unduly discriminate against the respondent and cites cases supporting the power of the legislature to classify occupations for the exercise of the police power, Barbier v. Connelly, 113 U. S. 27; 28 L. Ed. 923; 5 S. Ct. 357; Mugler v. Kansas, 123 U. S. 623; 31 L. Ed. 205; 8 S. Ct. 273; Holden v. Hardy, 169 U. S. 366; 42 L. Ed. 780; 18 S. Ct. 383; State v. Guertin, 88 N. H.

The State claims that to be valid the classification of an occupation for the purpose of regulation requires only reasonable grounds of distinction. It is argued that for hire carriers can reasonably be expected to use the highways more frequently than those not in that business and that the business of transporting for hire is in effect engaging in

the business of a public utility, and cites Munn v. Ill., 94 U. S. 113; 24 L. Ed. 77. In support of its position that the business of a public utility may be the object of special regulations, it is further pointed out that the rule of equality applies to the legislative power to tax as well as to its power to enact police regulations, Williams v. State, 81 N. H. 341, and points to the fact that the legislature may establish exemptions from taxation without violating the principle of [fol. 6-15] equality, Canaan v. District, 74 N. H. 517; Keene v. Roxbury, 81 N. H. 322; Sunapee v. Lempster, 65 N. H. 655; Opinion of the Justices, 84 N. H. 559, 569; Opinion of the Justices, 88 N. H.

The State further argues that the burden of regulating private carriers may be out of proportion to the benefits expected to accrue from regulation. It argues that every possible presumption must be made in favor of the validity of the statute and that the presumption continues until the contrary is shown beyond a rational doubt, Rich v. Flanders, 39 N. H. 304; Opinion of the Justices, 77 N. H. 611, 617; Musgrove v. Parker, 84 N. H. 550; Union Pac. R. R. v. U. S., 99 U. S. 700; 25 L. Ed. 496.

Presumably the Legislature had before it a situation which it wished to correct. The chaotic condition which existed in the field of transportation for hire was public knowledge. This condition did not apply to private transportation. Private carriers were not forced to meet cut-throat competition resulting in non-compensatory rates which could only be met in the requirement of greater and longer demands on its employees. However, here again the question raised is not for our determination. We have no authority to find on the issue raised.

Violation of the Act by the Company

3. The Company claims that the evidence does not establish violation of the act by it. It cites the fact that many of its drivers are operating in interstate commerce. It argues that the State has not shown service operation in excess of 12 hours on New Hampshire highways. It claims the State has not shown that the vehicles were not under the control of two licensed operators or that such excess driving was not due to emergency. It further argues that it must appear that the Company has either required or permitted operation in excess of 12 continuous hours be-

fore a violation can be charged to the Company and claims that there is no evidence that the excessive hours of service [fol. 6-16] were required by the Company or that the Company had knowledge that its drivers were working excess hours.

As we interpret the statute, a driver who has been on duty 12 hours, even if on duty in another state for all or a greater portion of that time, violates the law if he operates on the highways of this State subsequent to the 12-hour tour of duty without a three or an eight-hour rest period. The evidence shows that drivers operate on an hourly basis of pay and further shows that long tours of duty either follow or precede relatively short days. Any claim of the Company that it had no knowledge of the hours on duty is controverted by the fact that drivers are paid on an hourly basis. In the case of Chevrette he was called to work four hours earlier than his regular period and it is ridiculous to argue in this case that the long hours were not required by the Company. Further there can be no reasonable doubt that Chevrette operated on the highways of New Hampshire after having been on duty more than 12 hours in view of the circumstances disclosed on record. As to the claim that the State failed to show that there were not two drivers on the truck, such claim is clearly in error. The record clearly shows that Chevrette was the only driver on the truck on January 11 and 26, 1937, on which days violations occurred. Incidently, his record shows that two men were on the truck January 7, 8, 9, and 27, but only one man on all other days of the month.

No emergency blanks have been filed by either the drivers or the Company. If there have been such delays, the Company has been negligent in not filing the blanks as required by the rules and should not now be heard to claim that the State has failed to show that the overtime driving did not result from emergency delays.

The State argues that the rule of procedure is well established in this State that convenience and justice may require the party not having the burden of proof to go forward with evidence when a prima facie case has been made out against it. Spilene v. Co., 79 N. H. 326; Raymond v. Co., 86 N. H. [fol. 6-17] 93, 96. In the Spilene Case the Court said at p. 328:

"In this jurisdiction procedure is what justice and convenience require. The rule in question has been criticized

chiefly upon the ground that it attempts to shift the burden of proof upon one of the issues in the case, Lisbon v. Lyman, 49 N. H. 553. But this is not a necessary result. A rule that upon an issue lying more particularly within the knowledge of one party he shall disclose his knowledge or the issue shall be decided against him, does not of necessity involve the further rule that if the evidence is produced, and the matter proves to be a disputed one, the burden is upon the party not having it generally in the trial. Justice and convenience may require that in certain phases of a case the party not having the burden of proof shall produce evidence, upon pain of that issue being decided against him if he declines to do so.

"The phrase burden of proof has been used in two very different senses. In its true sense it means the risk of non-persuasion upon the evidence in the case. But it is also used to designate the duty to go forward and produce evidence. In the first and true sense of the term the burden once fixed by the pleadings never shifts. In the secondary sense it frequently shifts during the progress of a trial. Wig. Ev., s. 2489.

"The argument against the free application of the idea that under certain circumstances the defendant should be called upon to produce evidence rests in its final analysis upon the theory that since the plaintiff makes a charge he must prove it. But this general rule is not now and never has been carried to the extreme limit of its logic. Many defences are treated as matters in confession and avoidance; and when they are pleaded, the burden is put upon the defendant in both senses. He has the duty to go forward and produce evidence and also the risk of non-persuasion. If he is sued upon a promissory note he must seasonably deny his signature or his non-action is taken as his admission of the signature. The logic of the general principle that the plaintiff should have the duty to go forward and the risk of non-persuasion has always been modified by the application of what was at the time deemed to be the common sense of the situation. It may be that many of the cases have gone too [fol. 6-18] far is this respect. It is undoubtedly true that the authorities are not harmonious, yet the essential soundness of the principle which they have sought to apply cannot be doubted."

On brief the State says:

"It appears (R. 34, 35) that the men whose hours of service records are contained in exhibits 7, 8, 9 are New Hampshire residents. Until respondent comes forward with evidence to the contrary, it is fair to infer that the excess hours of work were performed in New Hampshire. It is difficult to imagine a stronger case for the application of the rule set out above than the present one. To hold that the respondent had no duty to go forward upon the present state of facts, is to overwhelm the statute with an impossible burden of minute by minute supervision of all carriers subject to it."

Continuing the State's argument:

"Respondent's argument that in any event the wrongful acts are acts of its employees and not the acts of the corporation is a casuistry that ignores a fundamental principle of the law of corporations. If a corporation acts at all it must act through human agents. The act of the servant within the scope of his employment is the act of the master. This is true even though the servant acts in a manner contrary to the expectations of his employer. Danforth v. Fisher, 75 N. H. 111; Patenaude v. Railroad, 77 N. H. 74; Richard v. Co., 79 N. H. 380. Respondent has offered no evidence that the drivers in operating during the excess periods shown on their reports were not operating within the orbit of respondent's permission or requirements. In the absence of affirmative evidence of this character, it is unreasonable to infer that truck drivers follow their arduous tasks for more than twelve hours for fun or by preference. A clear violation of section 8 of the statute appears from the state's testimony in this case for which it is proper for the commission to revoke respondent's registration."

The fact that Osgood, Buswell and Hook had not filed Hours of Service Records though operating over routes wholly within this State conclusively shows a violation of Rule 4n, and of the orders making such rule effective.

[fol. 6-19] Commission Authority to Prescribe Rules

4. The Company challenges the authority of the Commission to make rules and regulations relating to Hours of Service. It claims that the Commission is limited to orders

to compel compliance, but is not authorized to make rules and regulations to facilitate investigation. It further claims that the rules and regulations go beyond the terms of the statute and purport to require acts not required by the statute. It further contends that the duty of filing reports and otherwise keeping Hours of Service Records is upon the drivers and not the Company. The position of the State is shown in the following quotation from its brief:

"The Commission had authority to promulgate the regulations effective August 1, 1936 by an order dated July 11, 1936. The language of the statute expressiy grants such authority. While a forthright declaration that the commission is hereby authorized to issue necessary rules and regulat-ons in connection with the enforcement of this act, does not appear, words of art are not necessary to confer the power to make rules and regulations upon an administrative body. It is abundantly clear and leaves no room for argument that the act as a whole is to be administered by the Public Service Commission. The last sentence of section 8, 'The Commission shall have authority to enforce the provisions of this section', empowers the commission to do whatever is necessary for successful enforcement including the issuance of rules and regulations. If this were not so the sentence is entirely superfluous. It would be a mere restatement of what previous sections make plain. The legislature will not be presumed to have used useless language. The express reference to orders issued under the provisions of the Act in section 12 reinforces the grant of authority in the last sentence of section 8.

"The rules and regulations promulgated do not exceed the authority granted. They are a reasonable means by which the commission can carry out its duty of enforcing the law. In State v. Normand, 76 N. H. 541, the statute forbad the existence of unclean, unhealthful or unsanitary conditions and further declared that they existed if food [fol. 6-20] in the process of production, storage, sale or distribution is unnecessarily exposed to flies, dust or dirt. A regulation adopted by the State Board of Health to the effect that bread should be wrapped in paper was held to be a reasonable regulation. In the present case the statute prohibits excessive hours of labor. A requirement that the actual hours of labor be reported is a requirement obviously calculated to produce compliance with the statute. Such

a regulation is not an unconstitutional exercise of legislative power. The commission has not assumed a power to make the law, it merely has exercised discretion in its execution. The rules and regulations that the respondent challenges are reasonable methods by which the legislative purpose can be carried out. State v. Normand, supra. See: Grafton & c. Co. v. State, 77 N. H. 490; Ferretti v. Jackson, 88 N. H. —."

We are of the opinion that we have authority to make rules, regulations and orders under Section 8 as to Hours of Service. Whether or not we have authority to make rules and regulations or orders as to other provisions of the Act is not here involved.

Conclusions

We find that the H. P. Welch Company has violated the provisions of the Laws of 1933, s. 8, c. 106. We further find that the H. P. Welch Company has violated Rule 4n of Circular No. 2 of the Commission's Rules and Regulations, and Orders Nos. 2560 and 3101.

The Commission has authority to suspend or revoke any registration certificate issued in accordance with the provisions of the Act for violation of the provisions of the Act. The penalty is a serious one as even a short suspension may result in the permanent loss of considerable patronage. Either suspension or revocation may seriously inconvenience the shipping public, at least temporarily. Under these circumstances, the authority should be exercised with caution and with sufficient notice of suspension or revocation to the public to permit of necessary adjustments to other services.

[fol. 6-21] Our order will issue suspending the registration certificates, which permit the H. P. Welch Company to lawfully transport shipments as a common and contract carrier by motor vehicle in the State of New Hampshire, for the following five days, December 27, 28, 29, 30, and 31, in the year 1937. We are at this time directing the Attorney-General to seek in the Superior Court in equity, in the name of this Commission, pursuant to Laws of 1933, c. 169, s. 2, an appropriate order restraining for the future violation of the statute and our orders issued thereunder by the H. P. Welch Company.

Smith and Barry, Commissioners, concurred.

ORDER NO. 3397

Upon consideration of the foregoing report, which is made a part hereof, it is

Ordered, that any and all registration certificates issued by this Commission, permitting the H. P. Welch Company to lawfully transport property for hire in motor vehicles between points within this State, either as a common carrier or contract carrier, be, and hereby are, suspended for the following five (5) days:

December 27, 1937.
December 28, 1937.
December 29, 1937.
December 30, 1937.
December 31, 1937.

By order of the Public Service Commission of New Hampshire this eleventh day of December, 1937.

James W. Doon, Secretary.

[fol. 7] IN SUPREME COURT OF NEW HAMPSHIRE

[Title omitted]

PETITION FOR APPEAL

To the Chief Justice of the Supreme Court of the State of New Hampshire:

Your petitioner, H. P. Welch Company, a corporation of the state of Massachusetts, considering itself aggrieved by the final decree of the Supreme Court of the State of New Hampshire, rendered June 7, 1938, in the above entitled cause, dismissing the petitioner's appeal from an order of the Public Service Commission of New Hampshire, hereby prays that an appeal by this petitioner be allowed to the Supreme Court of the United States herein to the end that said degree may be there reviewed, that the order of appeal operate as a supersedeas, and that an order be made fixing [fol. 8] the amount of the bond required of the petitioner herein on such appeal.

Assignment of Errors

The said petitioner assigns the following errors in the record and decree of the said Supreme Court of New Hampshire, to wit, that the said Supreme Court erred in its said decision as follows:

1. In holding that sections 3, 4 and 8 of chapter 106 as amended by chapter 169 of the New Hampshire Session Laws of 1933 do not deny to this petitioner the equal protection of the laws as guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

2. In holding that sections 8 and 11 of chapter 106 as amended by chapter 169 of the New Hampshire Session Laws of 1933, as applied to this petitioner while engaged in interstate commerce, were not superseded and rendered void by the enactment of section 304a of title 49 of the United States Code, commonly cited as the "Motor Carrier Act of 1935".

3. In rendering a decree dismissing this petitioner's appeal from an order of the Public Service Commission of New Hampshire suspending petitioner's common and contract [fol. 9] carrier registration because of alleged violations of section 8 of chapter 106 as amended by chapter 169 of the New Hampshire Session Laws of 1933, the said section 8 being repugnant to the Constitution and laws of the United States as above set forth.

Prayer for Reversal

For these errors the said petitioner prays that the decree of the Supreme Court of New Hampshire, in the above entitled cause, be reviewed by the Supreme Court of the United States, and reversed, and a decree ordered in favor of the said petitioner, and for costs.

Richard F. Upton, Lawrence I. Duncan, Robert W. Upton, Attorneys for H. P. Welch Company, Petitioner and Appellant.

[fol. 10] IN SUPREME COURT OF NEW HAMPSHIRE

[Title omitted]

ORDER ALLOWING APPEAL

The Petition of H. P. Welch Company, a corporation of the State of Massachusetts and appellant in the above entitled cause, for an appeal therein to the Supreme Court of the United States from the Supreme Court of the State of New Hampshire and the Assignment of Errors filed therewith having been considered:

It is ordered: That an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of New Hampshire as prayed in said petition and that the clerk of the Supreme Court of the State of New Hampshire shall prepare and certify a transcript of the record and proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof. [fols. 11-16] The said appellant now presenting its bond in the sum of Three Hundred Dollars, executed by The Fidelity & Casualty Company of New York as surety, it is ordered that such bond be and the same is hereby approved.

It is further ordered that the appeal herein shall operate as a supersedeas and suspension of the order of the Public Service Commission.

Dated, July 14, 1938.

John E. Allen, Chief Justice of the Supreme Court of New Hampshire.

[fol. 17] IN SUPREME COURT OF NEW HAMPSHIRE

H. P. WELCH COMPANY

v.

STATE

OPINION—June 7, 1938.

Appeal, from an order of the Public Service Commission suspending for five specified days "any and all registration certificates issued by this Commission, permitting the H. P. Welch Company to lawfully transport property for hire in

motor vehicles between points within this State, either as a common carrier or contract carrier."

The H. P. Welch Company, for convenience hereinafter referred to as the company, is a Massachusetts corporation engaged in the business of transporting property for hire over the public highways of this and other states. In the conduct of its business it owns and operates a fleet of motor trucks, eighteen of which were registered with the Public Service Commission under Laws 1933, c. 106, s.s.2,3, as both common and contract carriers for the year 1936, and twenty of which were so registered for the year 1937. Computed on the basis of tonnage approximately 99% of its business during those years was in interstate commerce and the remaining 1% was in intrastate commerce.

On April 13, 1937, the Public Service Commission ordered the company to "show cause why its common and contract carrier certificates should not be suspended or revoked," and set May 6, 1937, as the date for hearing. This order [fol. 18] recited violations by the company of the provisions of Laws 1933, c. 106, s. 8, "by requiring or permitting a driver to operate after he has been continuously on duty for more than twelve hours." It also recited violations by the company of rule 4N of Circular No. 2 of the commission's administrative rulings "by requiring or permitting a driver to operate without a record on the vehicle of his hours of service, and by failure to file with the Commission the 'Hours of Service Record' of each driver." At the hearing held pursuant to this order the company appeared by counsel and was given full opportunity to present its evidence and its arguments.

On December 11, 1937, the Public Service Commission filed its report and the order of suspension quoted above. By stipulation the order was suspended pending the outcome of this appeal.

Such further facts as are deemed material are stated in the opinion.

Lawrence I. Duncan and Robert W. Upton (Mr. Duncan orally), for the plaintiff.

Dudley W. Orr (by brief and orally), for the State.

WOODBURY, J.:

The plaintiff does not contend that the legislature in enacting Laws 1933 c. 106, as amended by Laws 1933, c.

169, intended to impose direct regulations upon interstate commerce as such, nor does it contend that the provisions of these statutes operate either to discriminate against such commerce or to impose an undue or unreasonable burden upon it. Southern Railway Co. v. King, 217 U. S. 524. Neither does the company challenge the doctrine [fol. 19] established in Hendrick v. Maryland, 235 U. S. 610, 622, and consistently adhered to ever since, (South Carolina State Highway Dept. v. Barnwell Bros., Inc., — U. S. —, and cases cited), to the effect that "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles • • • those moving in interstate commerce as well as others." As summarized in its brief the plaintiff's appeal is "upon the ground that the statute denies to it the equal protection of the laws guaranteed by the Bill of Rights of the Constitution of New Hampshire and by the 14 Amendment to the Constitution of the United States, upon the ground that the statute and Rule 4N, as applied to interstate commerce, have been superseded by the 'Motor Carrier Act, 1935' upon the ground that Rule 4N and the orders of the Commission relating thereto exceed the powers and authority of the Commission, and upon the further grounds that the evidence does not establish the Company's responsibility for the alleged violations, and that the findings and conclusions of the Commission set forth above are unwarranted by the evidence."

The statute under consideration applies only to those transporting property for hire, either as common or contract carriers as the latter term is defined in the act, and it applies to them only in so far as they operate motor vehicles over the public highways between points within this state. It does not apply to "those transporting products of their own manufacture or labor," and, in addition, section 4 of the act specifically exempts from its provisions [fol. 20] "motor vehicles not principally engaged in the transportation of property for hire," and "motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten mile limit on occasional trips, not exceeding two trips in any thirty-day period."

The company contends "that these exceptions and exemptions are discriminatory, and deny to it the equal protection of the laws guaranteed by the Constitution of New Hampshire and the Fourteenth Amendment to the Constitution of the United States."

Under Part I of the constitution of this state and under the fourteenth amendment to the constitution of the United States persons similarly situated are guaranteed similarity of treatment. In this respect the fourteenth amendment "adds nothing to the rights and liberties of the citizens of this state," (State v. Pennoyer, 65 N. H. 113, 115), "for our constitution secures to every person within its jurisdiction all the rights guaranteed to citizens of the United States by that amendment." State v. Aldrich, 70 N. H. 391. Not every legislative classification is within the ban of these constitutional limitations however. "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." Barbier v. Connolly, 113 U. S. 27, 32; Or, as stated in Opinion of the Justices, 85 N. H. 562, 564, "Classification to be valid must reasonably promote some proper object of public welfare or interest and may [fol. 21] not be sustained when the selection and grouping is so arbitrary as to serve no useful purpose of a public nature." Legislative classification to be constitutional must be based upon some substantial foundation, it may not be arbitrary, it must be germane to the purpose of the law. Woolf v. Fuller, 87 N. H. 64, 72, 73.

Recent decisions of the Supreme Court of the United States sustain the validity under the fourteenth amendment of classifications substantially similar to those made in the statute under consideration. Under these decisions a state, in the interest of highway safety, may not only single out carriers for hire by motor vehicle from such carriers in general and apply to the former regulations from which the latter are exempt, but it may also create classifications among carriers for hire based upon the nature and extent of their use of the highways. Packard v. Banton, 264 U. S. 140; Bekins Van Lines, Inc. v. Riley, 280 U. S. 80; Alward v. Johnson, 282 U. S. 509; Continental Baking Co. v. Woodring, 286 U. S. 352; Sproles v. Binford, 286 U. S. 374; Hicklin v. Coney, 290 U. S. 169.

In the Continental Baking Company case the court said, page 373, "The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the class of operations, which by reason of their habitual and constant use of the highways, brought about the conditions making regulation imperative." And, in Sproles v. Binford, supra, the court said: "There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none. The State is not [fol. 22] bound to cover the whole field of possible abuses. The question is whether the classification adopted lacks a rational basis."

These decisions establish that classifications of the sort here under consideration do not lack a "rational basis", and they are conclusive upon us on the question of the validity of Laws 1933, c. 106, under the fourteenth amendment to the federal constitution. In addition these decisions "are authority to be weighed" on the question of the validity of that statute under the constitution of this state. State v. Pennoyer, 65 N. H. 113, 115.

One of the expressed and evident purposes of the statute before us is to protect the users of the highways of this state from the dangers likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue. Undoubtedly this is a legitimate exercise of the state's police power, and, while it is true that a fatigued truck-driver transporting goods manufactured by him or his employer is as great a menace upon the highway as such a driver transporting property for hire, it does not follow that in the interest of highway safety no distinction may be drawn between them on the basis of the industry in which they are engaged. The legislature may well have been in the possession of facts indicating a practice on the part of carriers for hire to employ their drivers for long hours, while it may also have had before it evidence that such was not the practice among the owners of trucks used for other purposes. We may take judicial notice of the fact that trucks not used by common or contract carriers create a substantial amount of traffic over the highways but we cannot take judicial notice [fol. 23] of the conditions of employment in those industries. In other words, instances of the employment of truck-drivers for excessive hours may occur only sporadically and

then under circumstances of emergency in industries of this latter sort, while excessive hours of service may be a regular practice in the business of transporting goods for hire. At least, upon the basis of facts judicially known, we cannot say that the existence of such a situation could not have been found by the legislature, and under these circumstances its classification must be allowed to stand. South Carolina State Highway Dept. v. Barnwell Bros., Inc. — U. S. —.

Similar considerations support the exemption from the provisions of the act of "motor vehicles not principally engaged in the transportation of property for hire." Excessive hours of employment on vehicles so used may either be of such infrequent occurrence that regulation of them is unnecessary, or else it may have been the legislative judgment that regulations adequate to control persons regularly engaged in the business of common and contract carriers for hire by motor truck would bear upon persons not regularly so engaged with a weight disproportionate to any possible benefit which might thereby accrue to the public. Whether, under our constitution, frequency and extent of operation may alone provide a sufficient basis for classification we do not undertake to say, but they may properly be supporting reasons therefor when, as here, some other reason appears in conjunction with them.

In the case of local operations, in which from necessity the periods of driving must be frequently interrupted, it may well be that fatigue does not develop as rapidly or [fol. 24] become as great as it does in a driver subjected to the monotony incident to long and uninterrupted trips. For this reason the legislature may reasonably have decided that local operations did not require any regulation at all while regulation was imperative as to operations covering greater distances.

We are therefore unable to say that the classifications contained in the act are not germane to its purpose, that they lack a "rational basis," or that all persons in the same class are not accorded similar treatment. It follows that the act is not unconstitutional.

The case principally relied upon by the company, (Smith v. Cahoon, 283 U. S. 553), is not in point. In that case the court was called upon to consider a state statute purporting to regulate carriers of property for hire by motor trucks in the interest of highway safety which excluded from its

operation motor vehicles used to transport agricultural and dairy products and fish and oysters. In holding this classification arbitrary, without relation to the purpose of the act and hence unconstitutional, the court said: "But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities."

The distinction between the case cited and the one at bar is obvious. In the former, classification is based upon the kind of goods carried, and that without relation to the nature of those goods as inflammable, explosive, bulky or [fol. 25] otherwise likely to create a hazard when in transit over the highway. In the case before us, on the other hand, the classification is upon the basis of the nature of the business of the owner of the vehicle and, as appears above, a classification upon this basis is not necessarily an arbitrary or unreasonable one. The above distinction between the Smith case and cases similar to the one before us was fully elaborated in Aero Mayflower Tea Co. v. Georgia Public Service Commission, 295 U. S. 285.

The company's next contention is to the effect that the state statute has been superseded by the federal Motor Carrier Act, 1935. 49 Stat. 543.

Briefly stated the record of events is as follows: The state statute under consideration became law on May 6, 1933. The administrative rulings, Circular No. 2, referred to above became effective on August 1, 1936. The violations thereof and of the statute for which the company's registration certificates were suspended occurred during the latter part of 1936 and the first three months of 1937.

The federal Motor Carrier Act, 1935, became law in August 1935, and in that act, s. 204 (a) (2), it is provided that the Interstate Commerce Commission "may establish reasonable requirements with respect to * * * maximum hours of service of employees." Pursuant to this permissive power that commission held hearings at various places during the year 1937, and on December 29 of that year rendered its decision. In this decision it established maximum hours of service for employees of both common and contract carriers for hire by motor vehicle which are substantially similar to those established in Laws 1933 c.

106, s. 8, and in addition it provided for the keeping and [fol. 26] filing of records of service by such employees which are also substantially similar to the provisions of rule 4N mentioned above. By order of the Interstate Commerce Commission its requirements in the above respects were not to become effective until July 1, 1938.

The violations of the state act for which the company was put upon trial occurred, therefore, during the interval between the passage of the federal act and action thereunder by the Interstate Commerce Commission. The question presented is whether or not, during that time, the operation of the state statute, as it affected interstate commerce, was suspended by the federal act.

Generally stated the rule is that reasonable nondiscriminatory state action under the police power may indirectly affect interstate commerce, but it may affect such commerce only until Congress in the exercise of its plenary power takes action which covers the field. Oregon etc. Co. v. Washington, 270 U. S. 87. Both the state and the federal government cannot occupy the same field at the same time, (University Overland Express Co. v. Griffin, ante, and cases cited), and the time when Congress preempts the field depends upon its intention.

Applying this rule of Congressional intention the Supreme Court of the United States in Northern Pacific Railway v. Washington, 222 U. S. 370, and Erie Railroad Co. v. New York, 233 U. S. 671, held that state regulations of the hours of service of train crews, in so far as they applied to employees upon trains moving in interstate commerce, were suspended upon the date of passage of a federal statute upon the subject. This federal statute was passed on March 4, 1907, but by its terms it was not to take effect until one [fol. 27] year later. In holding that the state statutes were ineffective as to interstate commerce during that year the court said that Congress had manifested its intention to enter the field when it enacted the statue and that by postponing its effective date for a year it manifested an intention that the field should remain without regulation during that time.

The above cases are strongly relied upon by the company but we do not consider them to be in point. The reason for this is that the Hours of Service Act, (34 Stat. 1415), differs radically from the Motor Carrier Act, 1935. In the former Congress established the maximum hours of service per-

mitted and provided that the act should become operative one year from the date of its passage. In the latter Congress gave the Interstate Commerce Commission permission to fix the maximum hours of service and provided no date upon which the commission was required to put its rulings into effect. The cases establish that this difference is a material one.

In Missouri Pacific Railway Co. v. Larabee Mills Co., 211 U. S. 612, 623, it is said that "the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens." In Northwestern Bell Tel. Co. v. Nebraska State Railway Commission, 297, U. S. 471, it was held that state regulations in respect to depreciation rates for property used by a telephone company in interstate commerce were not suspended by a federal statute giving the Interstate Commerce Commission authority to [fol. 28] prescribe such rates "as soon as practicable." The court said, page 478, "The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates." See also Smith v. Ill. Bell Tel. Co., 282 U. S. 133.

Upon the authority of the cases last cited we hold that it was not the intention of Congress to enter the field of regulation of hours of service of truck-drivers engaged in interstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject. Whether that date was December 29, 1937, when those rulings were made, or whether it will not be until July 1, 1938, when they will go into effect, is a question not presented in the case at bar and one upon which we express no opinion. The violations of the state act charged against the company occurred before either of those dates and so at a time when the state act was in full force and effect. This same result has been reached as to other similar regulatory features of the Motor Carrier Act, 1935. L. & L. Freight Lines, Inc. v. Railroad

Commission of Florida, 17 F. Supp. 13; Werner Transportation Co. v. Hughes, 19 F. Supp. 425.

The company further contends that the commission is without statutory authority to promulgate rules and regula- [fol. 29] tions for the enforcement of the act and that in consequence it cannot be punished for failure to conform to the provisions of rule 4N of Circular No. 2 of the Administrative Rulings referred to above.

The act does not in terms give the Public Service Commission authority to prescribe rules and regulations for the carriers to which it applies. A study of the act as a whole, however, makes it abundantly clear that the legislature intended to commit the enforcement of its provisions to the commission. In addition, the section of the act which limits hours of service, (s. 8), specifically provides that "The commission shall have authority to enforce the provisions of this section," and section 12 provides a punishment by fine for "violating the orders of the commission issued under the provisions of this act." These provisions taken together and considered in the light of the general scheme of the statute and the rule making power given to the commission in other phases of its activities, lead to the conclusion that although the commission is "an agency of limited powers and authority," (Petition of Boston & Maine Railroad, 82 N. H. 116) it was the legislative intention that the commission should enforce the provisions of this statute in the same way that it enforced its supervisory authority in other respects, i. e. by the promulgation of appropriate rules and regulations.

To construe the sentence quoted from section 8 otherwise than as above would be to hold that it gives to the commission only such powers of enforcement as are given by the general law to police officers. To say the least it seems unlikely that such was the intention of the legislature.

[fol. 30] Rule 4N, after paraphrasing the provisions of section 8 of the statute, requires that each driver shall keep with him while on duty a record of his hours of service on forms prescribed by the commission, and that copies of such records shall be kept by his employer. It also provides that these records shall be filed with the commission at the end of each month. These rules do not attempt to establish any broad "policy and standard for action," (Ferretti v. Jackson, 88 N. H. 296, 304; Opinion of the Justices, 88 N. H. 497), and so do not amount to an unconstitutional usurpation of

legislative power by the commission. The rules are well calculated to aid the commission in the enforcement of the act and are valid exercise by the commission of the powers given to it by the statute.

The company's next contention is that the Public Service Commission exceeded its statutory authority in suspending the company's registration certificates for violation of the commission's administrative rules. A sufficient answer to this contention is that it does not appear that the commission's order of suspension was based upon such violations rather than upon a violation of the statute itself.

The statute, (s. 11), gives the commission authority to suspended certificates of registration for violations of the provisions of the act. Section 12 as amended by Laws 1933, c. 169, s. 2, imposes a fine of not more than one hundred dollars for violation of "the provisions of this act or the orders of the commission issued under the provisions of this act." We need not consider the question of the power of the commission to punish under this latter section because it has [fol. 31] imposed no fine. Instead it has suspended the company's certificates of registration. This is one of the punishments prescribed by the act for its violation and authority to suspend was clearly granted to the commission. Suspension of registration certificates is not a punishment provided for violation of the rules of the commission, and while there is evidence that the plaintiff had violated both the act and the administrative orders, there is nothing to show that the commission based its order of suspension upon a violation of the latter rather upon a violation of the former. To assume without evidence that it had disobeyed the statute by imposing the suspension for a violation of its orders rather than for a violation of the act would be to assume that the commission had disregarded the clear wording of the statute. This is an assumption we are not compelled to make.

It is established law in this jurisdiction that, in the absence of indications to the contrary, a general finding includes a finding of all the special facts necessary to sustain it. Spaulding v. Mayo, 81 N. H. 85; Bean v. Quirin, 87 N. H. 343, 350, and cases cited. We see no reason why this principle applicable to the findings of inferior courts is not also applicable to the Public Service Commission when acting judicially, and, applying it to the order of the commission before us, we conclude that the suspension of registration

which the commission imposed upon the company was for the violation by it of the provisions of the statute and that its violations of the administrative orders were either not found or were permitted to pass without punishment.

[fol. 32] The evidence before the commission of the company's violation of the statute by requiring or permitting its drivers to operate its trucks for illegally excessive hours was in the form of reports filed under the provisions of rule 4N by a few of the drivers. The company does not, nor may it, complain of the informality with which this evidence was presented. P. L. c. 238, s. 10; State v. New Hampshire Gas & Electric Co., 86 N. H. 16, 31. Its complaint is that this evidence provides an insufficient basis for the order of suspension for the reason that it does not show that the company "required or permitted" its drivers to operate for excessive hours; that it does not show that driving in excess of the statutory limits occurred in New Hampshire rather than in other states in which the drivers served; and that it fails to reveal that such excess hours of operation did not occur under circumstances of emergency or upon a truck under the control of two licensed operators.

The evidence contained in the reports on file with the commission show not only periods of employment for longer hours than the statute permits, but they also show repeated instances of such excessive hours and the oral testimony given before the commission by the company's local manager showed that the drivers were paid on an hourly basis. Under these circumstances it would be little short of preposterous to say that the company had no knowledge of the hours of its drivers' employment. It would be equally preposterous to find that the drivers when operating over the statutory limits were acting outside the scope of their employment; that they were engaged upon a frolic of their [fol. 33] own. The obvious inference from the testimony is that the company not only permitted but also even arranged its trips so as to require that its drivers serve beyond the statutory limit of hours of service.

Proof that some of the company's drivers operated for hours in excess of statutory limit in this state is contained in the inferences which may be drawn from their reports. These reports indicate that some of the drivers lived in Manchester and that their tours of duty after excessive hours of operation ended there. Obviously to have completed such a period of service within this state they must

of necessity have operated illegally within its borders. The fact that some of the hours of service which went to make up the statutory limit occurred outside the state is not material. There is no violation of the statute until an operator has reached the limit of hours of operation allowed. The offense consists in operating thereafter, and such violation could findably have occurred within the state.

The other respects noted above in which it is claimed that the evidence is deficient relate to matters peculiarly within the company's knowledge. If such facts existed it was the province of the company to offer evidence of their existence, (State v. Foster, 23 N. H. 348; State v. Lapointe, 81 N. H. 227; State v. Bozek, 81 N. H. 277), and full opportunity was given to it to do so.

Since the days specified for the suspension of the company's certificates have passed, the commission may amend its order by specifying other days upon which its order of suspension shall be operative.

Appeal dismissed.

All concurred.

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 35] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed September 1, 1938

Comes now, H. P. Welch Company, appellant in the above entitled cause, and states that the points upon which it intends to rely in this court in this case are as follows:

1. The Supreme Court of The State of New Hampshire erred in its decision in the above entitled cause in holding that sections 3, 4 and 8 of Chapter 106 as amended by Chapter 169 of the New Hampshire Session Laws of 1933 do not deny to this appellant the equal protection of the laws as guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of The State of New Hampshire erred in its decision in the above entitled cause in holding [fol. 36] that sections 8 and 11 of Chapter 106 as amended by Chapter 169 of the New Hampshire Session Laws of 1933, as applied to this appellant's operations in interstate commerce, were not superseded, and rendered void by the enactment of section 304a of title 49 of the United States Code.

The appellant further states that the following parts of the record, as filed in this court, are necessary to be printed for the consideration of the points set forth above.

1. Agreed summary of proceedings.
2. Report of Public Service Commission and order.
3. Opinion of the Supreme Court of New Hampshire and order.
4. Docket entries in the Supreme Court of New Hampshire.
5. Petition for appeal to the Supreme Court of the United States and assignment of errors.
6. Order allowing appeal.

Respectfully submitted, Robert W. Upton, Counsel for Appellant.

Dated August 31, 1938.

The appellee, The State of New Hampshire, hereby acknowledges service of the foregoing statement and agrees that the parts of the records designated by the appellant shall constitute the record on appeal.

Dudley W. Orr, Counsel for Appellee.

Dated August 31, 1938.

[fol. 37] [File endorsement omitted.]

Endorsed on cover: Enter; Robert W. Upton. File No. 42,780. New Hampshire Supreme Court. Term No. 295. H. P. Welch Company, appellant, vs. The State of New Hampshire. Filed August 22, 1938. Term No. 295, O. T., 1938.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 295

H. P. WELCH COMPANY,

Appellant,

vs.

STATE OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

STATEMENT AS TO JURISDICTION.

RICHARD F. UPTON,
LAWRENCE I. DUNCAN,
ROBERT W. UPTON,
Counsel for Appellant.

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SUPREME COURT, STATE OF NEW HAMPSHIRE

1938 TERM.

H. P. WELCH COMPANY,

Appellant,

vs.

STATE OF NEW HAMPSHIRE,

Appellee.

STATEMENT IN SUPPORT OF JURISDICTION.

The appellant, H. P. Welch Company, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 344(a) of Title 28 of the United States Code, reading, to the extent relevant here, as follows:

> "Sec. 344(a). Final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861(a) of Title 28 of the United States Code.

B.

Statutes of the State the Validity of Which is Involved.

The statutes of the State of New Hampshire, the validity of which has been sustained by a final decree of the Supreme Court of the State of New Hampshire, the highest court of said State, as not being violative of or repugnant to the Constitution and laws of the United States, are Sections 3, 4, 8 and 11 of Chapter 106, as amended by Chapter 169, Session Laws of 1933, State of New Hampshire, approved May 6, 1933 (Session Laws of 1933, page 146). The pertinent provisions thereof are:

"CHAPTER 106.

"An Act Relating to Carriers of Property for Hire on the Public Highways.

* * * * * * *

"2. Common Carrier Registration.—No person, corporation, partnership, association, railroad or railway company, shall operate any motor vehicle, not running upon rails or tracks, upon any public highway transporting property for hire as a common carrier, between points within this state, without first obtaining a registration and special number plates from the public service commission, hereinafter called the commission. * * *

"3. Contract Carrier Registration.—The term contract carrier as used in this act shall include every person, firm or corporation transporting property for hire by motor vehicle on any public way in this state, other than common carriers, those transporting products of their own manufacture or labor and those exempted in section 4 of this act. * * * No contract carrier shall

operate any motor vehicle for the transportation of property for hire on any public way between points within this state without first obtaining a registration certificate and special number plates from the commission.

"4. Exemptions.—There shall be exempted from the provisions of this act:

I. Motor vehicles not principally engaged in the transportation of property for hire.

II. Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period. * * *

"8. Hours of Service.—It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty. * * * The commission shall have authority to enforce the provisions of this section.

"11. Revocation.—The commission shall have authority after notice and hearing, to suspend or revoke any registration certificate issued in accordance with the provisions of this act for violation of the provisions of this act."

The foregoing sections are believed to conflict with section one of the Fourteenth Amendment to the Constitution of the United States and, as applied to the appellant's business in interstate commerce, with Section 304(a) of Title

49 of the United States Code, commonly cited as "The Motor Carrier Act of 1935", the provisions of which are as follows:

> "SEC. 304(a). Powers and Duties Generally. It shall be the duty of the Commission—
>
> "(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.
>
> "(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final decree of the Supreme Court of the State of New Hampshire, which is now sought to be reviewed was June 7, 1938. Appellant's motion for a rehearing was denied on June 21, 1938. The time for taking the appeal began to run on the date of the denial of said motion for a rehearing, to wit, June 21, 1938. *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31.

The date on which the application for appeal was presented and the appeal allowed was July 14, 1938.

Under the provisions of Section 350 of Title 28 of the United States Code, the appellant may bring its appeal

within three months after the entry of the decree of the Supreme Court of the State of New Hampshire.

D.

Nature of Case and Rulings Below.

On April 13, 1937, the appellant, H. P. Welch Company, a Massachusetts corporation operating on the highways of New Hampshire in the common carriage of property by motor vehicle, was ordered to appear before the Public Service Commission of New Hampshire to show cause, if any, why its common and contract carrier registrations should not be suspended. The appellant was charged with violating section 8 of Chapter 106, as amended by Chapter 169 of the New Hampshire Session Laws of 1933, relating to hours of service of truck drivers (R. 6). A hearing was held before the Commission on May 10, 1937, at which the case against the appellant was prosecuted by counsel for the State of New Hampshire, appellee, and defended by counsel for the appellant. In the course of the hearing it appeared in evidence, which was uncontroverted, that every truck operated by the appellant corporation always carried some interstate shipments and that 99 per cent of the tonnage carried by the appellant consisted of interstate shipments (R. 52, 55). On December 11, 1937, the Commission issued a report finding the appellant corporation guilty of violating the said section 8, in its operations in interstate commerce, during the years 1936 and 1937 (19 N. H. Public Service Commission Reports, 445, 446; R. 8, 9). The Commission held that Section 8 applied to the appellant's operations in interstate commerce and that said section together with sections 3 and 4 did not unreasonably classify the appellant and discriminate against it (19 N. H. Public Service Commission Reports 447, 456; R. 10, 18). Accordingly the Commission issued an order by virtue of its power under

Section 11 of said Chapter 106, suspending for five consecutive days the appellant's common and contract carrier registration to operate in intrastate transportation in New Hampshire. (19 N. H. Public Service Commission Reports 464; R. 26). The appellant seasonably moved for a rehearing assigning as reasons that the said Section 8 of Chapter 106, as applied to interstate commerce, had been superseded in the year 1935 by Section 304(a) of Title 49 of the United States Code and that the said Section 8 together with Sections 3 and 4 constituted an unreasonable and discriminatory classification, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 28). On December 22, 1937, the Commission denied appellant's motion for a rehearing (R. 27).

Thereupon the appellant appealed from the Commission's order to the Supreme Court of the State of New Hampshire, in accordance with the provisions of Chapter 239 of the Public Laws of New Hampshire. The order of the Commission was suspended pending the appeal. In its petition for appeal the appellant seasonably claimed that the said Section 8 of Chapter 106 of the Session Laws of 1933, as applied to interstate commerce, had been superseded by Section 304(a) of Title 49 of the United States Code, and that the said Section 8 together with Sections 3 and 4 denied the appellant the equal protection of the laws, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 5).

On June 7, 1938, the Supreme Court of the State of New Hampshire rendered a decree dismissing the appellant's appeal and affirming the order of the Commission. *H. P. Welch Co.* v. *State*, 89 N. H. —.

The Supreme Court held that the exemption of certain carriers, under Sections 3 and 4 of said Chapter 106, from the operation of said chapter did not constitute an unrea-

sonable classification so as to deny to the appellant the equal protection of the laws. The Court stated in its opinion:

> "We are therefore unable to say that the classifications contained in the act are not germane to its purpose, that they lack a 'rational basis', or that all persons in the same class are not accorded similar treatment. It follows that the act is not unconstitutional." (89 N. H.)

The Court further held that the enactment of Section 304(a) of Title 49 of the United States Code, commonly cited as the "Motor Carrier Act of 1935", had not rendered inoperative the said Section 8 of Chapter 106 of the New Hampshire Session Laws of 1933 as applied to interstate commerce, because the Interstate Commerce Commission had not exercised its authority under the said "Motor Carrier Act of 1935" to prescribe maximum hours of service, at the time when the alleged violations of Section 8 of the New Hampshire statute occurred. The Court stated in its opinion:

> "Upon the authority of the cases last cited we hold that it was not the intention of Congress to enter the field of regulation of hours of service of truck-drivers engaged in interstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject." (89 N. H.).

The Interstate Commerce Commission on June 14, 1938, issued an order entitled *Ex Parte No. MC-2*, fixing August 1, 1938, as the effective date of its orders as to maximum hours of service of motor carrier employees, issued pursuant to the "Motor Carrier Act of 1935."

In hearing and deciding the aforesaid appeal by the appellant from the order of the Public Service Commission, the Supreme Court of the State of New Hampshire was acting in a judicial capacity, rather than in an administrative or legis-

lative capacity. Appeals from orders of the Public Service Commission are governed by Chapter 239 of the Public Laws of New Hampshire. In the case of *Grafton County Electric Light Co.* v. *State*, 77 N. H. 490, 508, the Supreme Court of New Hampshire held that the statutory appeal from the Public Service Commission is a "judicial" proceeding. The power of review which the said Chapter 239 of the Public Laws confers upon the Supreme Court of New Hampshire is quite similar to that which the Supreme Court of the United States has held to be of "judicial" character in the cases of *Federal Radio Commission* v. *Nelson*, 289 U. S. 266, and *Public Service Commission of Porto Rico* v. *Havemeyer*, 296 U. S. 506. Consequently the Supreme Court of the United States may review the decree of the Supreme Court of the State of New Hampshire in this case, the said decree having been rendered in a judicial proceeding.

E.

Substantiality of Questions Involved.

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258.

The issue raised by the appellant's contention that the New Hampshire statute here in question violates the "equal protection clause" of Section 1 of the Fourteenth Amendment to the Constitution of the United States involves the problem of discriminatory classification. Section 8 of Chapter 106, as amended by Chapter 169 of the New Hampshire Session Laws of 1933, limits the hours of service of truck-

drivers employed by all motor carriers engaged in "the transportation of property for hire on the highways of this state". This section is designed to safeguard the general public with respect to use of the highways. Sections 3 and 4 of the said Chapter 106 exempt from the operation of Section 8 all "carriers transporting products of their own manufacture or labor", all "motor vehicles not principally engaged in the transportation of property for hire", and all "motor vehicles operating exclusively within the limits of a single city or town or within ten miles of the limits thereof." It is a matter of general knowledge that the traffic of motor carriers thus exempted by Sections 3 and 4 of the said Chapter 106 is large and presents the same hazards to the public as the traffic of those motor carriers which are subject to the said Section 8. So far as the New Hampshire statute is designed to safeguard the public with respect to the use of the highways, the appellant contends that the discrimination it makes between those motor carriers which are relieved from the operation of the said Section 8, and a motor carrier such as the appellant, is wholly arbitrary and unreasonable. "Such a classification is not based on anything having relation to the purposes for which it is made." *Smith* v. *Cahoon*, 283 U. S. 553. Furthermore the question thus raised by the New Hampshire statute here in question has never been expressly passed upon by the Supreme Court of the United States. For these reasons, the appeal presents a substantial Federal question. *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476.

The issues raised by the appellant's contention that the New Hampshire statute here in question is repugnant to the "Motor Carrier Act of 1935" have also never been decided by the Supreme Court of the United States. Section 8 of the said Chapter 106 of the New Hampshire Session Laws of 1933, as before stated, limits the hours of service of truck-drivers employed by carriers transporting property for

hire. In the case at bar the Supreme Court of the State of New Hampshire has held Section 8 applicable to the appellant's truck-drivers employed in interstate transportation during the years 1936 and 1937. The "Motor Carrier Act of 1935" delegates to the Interstate Commerce Commission the power and duty to establish reasonable regulations concerning maximum hours of service of truck-drivers engaged in interstate transportation (49 U. S. C., § 304 (a)). During the years 1936 and 1937, when it is alleged that the appellant corporation violated Section 8 of the New Hampshire Statute in question, there were in effect no regulations by the Interstate Commerce Commission concerning maximum hours of service of truck-drivers employed in interstate transportation. But the act of Congress here in question had already recognized the necessity for Federal regulations of hours of service and had prescribed the method by which such regulations should become effective. Since the enactment of the "Motor Carrier Act of 1935", no regulations of hours of service prescribed by any other authority could be effective to regulate motor carriers of interstate commerce. *Northern Pacific Railway Company* v. *Washington*, 222 U. S. 370; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605.

Furthermore, the appeal upon this latter ground presents questions, the determination of which is important to all interstate carriers by motor vehicle and to all State regulatory authorities. The "Motor Carrier Act of 1935" has placed a vast field of interstate commerce under the jurisdiction of the Interstate Commerce Commission. Much of this field has hitherto been under the jurisdiction of the respective States and their public utilities commissions. Whether this transfer of jurisdiction to the Interstate Commerce Commission operates to supersede all State regulation in the field, even before the Interstate Commerce Commission issues regulations pursuant to the Motor Car-

rier Act, is a question of serious import, which is likely to be constantly recurring. By virtue of the here relevant section of the Motor Carrier Act (49 U. S. C., § 304 (a)) the Interstate Commerce Commission has power to issue reasonable regulations concerning not only maximum hours of service, but also safety of operation and equipment, continuous and adequate service, and uniform systems of accounts, records and reports. Until the Interstate Commerce Commission issues its regulations under this section of the Motor Carrier Act, all carriers by motor vehicle in interstate commerce and all State regulatory authorities will be in doubt whether State regulations of the same subject-matter are still in effect. A decision by the Supreme Court of the United States in this cause will remove this grave uncertainty by deciding to what extent the enactment of the here relevant section of the Motor Carrier Act (49 U. S. C., § 304 (a)) has rendered inoperative State regulations of the same subject-matter.

F.

Cases Sustaining the Jurisdiction.

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Timeliness of appeal. *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31.

2. Jurisdiction to entertain an appeal from the decision of a State court sitting in review of a State public utilities commission. *Grafton County Electric Light Co. v. State*, 77 N. H. 490, 508; *Federal Radio Commission v. Nelson*, 289 U. S. 266; *Public Service Commission of Porto Rico v. Havemeyer*, 296 U. S. 506; *Bradley v. Public Utilities Commission of Ohio*, 289 U. S. 92; *Northwestern Bell Telephone v. Nebraska Railway Commission*, 297 U. S. 471.

3. Jurisdiction to entertain an appeal from the decision of a State court on the ground that a State statute violates the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States. *Smith* v. *Cahoon*, 283 U. S. 553; *Aero Mayflower Tea Co.* v. *Georgia Public Service Commission*, 295 U. S. 285; *Hartford Steam Boiler Co.* v. *Harrison, Insurance Commissioner*, 301 U. S. 459; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476.

4. Jurisdiction to entertain an appeal from the decision of a State court on the ground that a State statute is repugnant to a statute of the United States. *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370; *Erie Ry. Co.* v. *New York*, 233 U. S. 671; *Pennsylvania Railroad Co.* v. *Public Service Commission*, 250 U. S. 566; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Oregon and Washington R. R. and N. Co.* v. *Washington*, 270 U. S. 102; *Missouri R. R. Co.* v. *Porter*, 273 U. S. 341.

Therefore the appellant, H. P. Welch Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344 (a) of Title 28 of the United States Code.

Respectfully submitted,

RICHARD F. UPTON,
LAWRENCE I. DUNCAN,
ROBERT W. UPTON,
Petitioner and Appellant.
Attorneys for H. P. Welch Company,

APPENDIX.

PUBLIC SERVICE COMMISSION.

#2966.

June 7, 1938.

H. P. WELCH COMPANY

v.

STATE.

Appeal, from an order of the Public Service Commission suspending for five specified days "any and all registration certificates issued by this Commission, permitting the H. P. Welch Company to lawfully transport property for hire in motor vehicles between points within this State, either as a common carrier or contract carrier."

The H. P. Welch Company, for convenience hereinafter referred to as the company, is a Massachusetts corporation engaged in the business of transporting property for hire over the public highways of this and other states. In the conduct of its business it owns and operates a fleet of motor trucks, eighteen of which were registered with the Public Service Commission under Laws 1933, *c.* 106, *s. s.* 2, 3, as both common and contract carriers for the year 1936, and twenty of which were so registered for the year 1937. Computed on the basis of tonnage approximately 99% of its business during those years was in interstate commerce and the remaining 1% was in intrastate commerce.

On April 13, 1937, the Public Service Commission ordered the company to "show cause why its common and contract carrier certificates should not be suspended or revoked," and set May 6, 1937, as the date for hearing. This order recited violations by the company of the provisions of Laws 1933, *c.* 106, *s.* 8, "by requiring or permitting a driver to operate after he has been continuously on duty for more than twelve hours." It also recited violations by the company of rule 4N of Circular No. 2 of the commission's administrative rulings "by requiring or permitting a driver

to operate without a record on the vehicle of his hours of service, and by failure to file with the Commission the 'Hours of Service Record' of each driver." At the hearing held pursuant to this order the company appeared by counsel and was given full opportunity to present its evidence and its arguments.

On December 11, 1937, the Public Service Commission filed its report and the order of suspension quoted above. By stipulation the order was suspended pending the outcome of this appeal.

Such further facts as are deemed material are stated in the opinion.

Lawrence I. Duncan and *Robert W. Upton* (*Mr. Duncan* orally), for the plaintiff.

Dudley W. Orr (by brief and orally), for the State.

WOODBURY, *J.*:

The plaintiff does not contend that the legislature in enacting Laws 1933 *c.* 106, as amended by Laws 1933, *c.* 169, intended to impose direct regulations upon interstate commerce as such, nor does it contend that the provisions of these statutes operate either to discriminate against such commerce or to impose an undue or unreasonable burden upon it. *Southern Railway Co.* v. *King*, 217 U. S. 524. Neither does the company challenge the doctrine established in *Hendrick* v. *Maryland*, 235 U. S. 610, 622, and consistently adhered to ever since, (*South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, — U. S. —, and cases cited), to the effect that "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others." As summarized in its brief the plaintiff's appeal is "upon the ground that the statute denies to it the equal protection of the laws guaranteed by the Bill of Rights of the Constitution of New Hampshire and by the 14 Amendment to the Constitution of the United States, upon the ground that the statute and Rule 4N, as applied to interstate commerce, have been superseded by the

'Motor Carrier Act, 1935' upon the ground that Rule 4N and the orders of the Commission relating thereto exceed the powers and authority of the Commission, and upon the further grounds that the evidence does not establish the Company's responsibility for the alleged violations, and that the findings and conclusions of the Commission set forth above are unwarranted by the evidence."

The statute under consideration applies only to those transporting property for hire, either as common or contract carriers as the latter term is defined in the act, and it applies to them only in so far as they operate motor vehicles over the public highways between points within this state. It does not apply to "those transporting products of their own manufacture or labor," and, in addition, section 4 of the act specifically exempts from its provisions "motor vehicles not principally engaged in the transportation of property for hire," and "motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten mile limit on occasional trips, not exceeding two trips in any thirty-day period."

The company contends "that these exceptions and exemptions are discriminatory, and deny to it the equal protection of the laws guaranteed by the Constitution of New Hampshire and the Fourteenth Amendment to the Constitution of the United States."

Under Part I of the constitution of this state and under the fourteenth amendment to the constitution of the United States persons similarly situated are guaranteed similarity of treatment. In this respect the fourteenth amendment "adds nothing to the rights and liberties of the citizens of this state," (*State* v. *Pennoyer*, 65 N. H. 113, 115), "for our constitution secures to every person within its jurisdiction all the rights guaranteed to citizens of the United States by that amendment." *State* v. *Aldrich*, 70 N. H. 391. Not every legislative classification is within the ban of these constitutional limitations however. "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is

limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier* v. *Connolly*, 113 U. S. 27, 32; Or, as stated in *Opinion* of the Justices, 85 N. H. 562, 564, "Classification to be valid must reasonably promote some proper object of public welfare or interest and may not be sustained when the selection and grouping is so arbitrary as to serve no useful purpose of a public nature." Legislative classification to be constitutional must be based upon some substantial foundation, it may not be arbitrary, it must be germane to the purpose of the law. *Woolf* v. *Fuller*, 87 N. H. 64, 72, 73.

Recent decisions of the Supreme Court of the United States sustain the validity under the fourteenth amendment of classifications substantially similar to those made in the statute under consideration. Under these decisions a state, in the interest of highway safety, may not only single out carriers for hire by motor vehicle from such carriers in general and apply to the former regulations from which the latter are exempt, but it may also create classifications among carriers for hire based upon the nature and extent of their use of the highways. *Packard* v. *Banton*, 264 U. S. 140; *Bekins Van Lines, Inc.* v. *Riley*, 280 U. S. 80; *Alward* v. *Johnson*, 282 U. S. 509; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Sproles* v. *Binford*, 286 U. S. 374; *Hicklin* v. *Coney*, 290 U. S. 169.

In the *Continental Baking Company* case the court said, page 373, "The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the class of operations, which by reason of their habitual and constant use of the highways, brought about the conditions making regulation imperative." And, in *Sproles* v. *Binford, supra*, the court said: "There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none. The State is not bound to cover the whole field of possible abuses. The question is whether the classification adopted lacks a rational basis."

These decisions establish that classifications of the sort here under consideration do not lack a "rational basis",

and they are conclusive upon us on the question of the validity of Laws 1933, *c.* 106, under the fourteenth amendment to the federal constitution. In addition these decisions "are authority to be weighed" on the question of the validity of that statute under the constitution of this state. *State* v. *Pennoyer*, 65 N. H. 113, 115.

One of the expressed and evident purposes of the statute before us is to protect the users of the highways of this state from the dangers likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue. Undoubtedly this is a legitimate exercise of the state's police power, and, while it is true that a fatigued truck-driver transporting goods manufactured by him or his employer is as great a menace upon the highway as such a driver transporting property for hire, it does not follow that in the interest of highway safety no distinction may be drawn between them on the basis of the industry in which they are engaged. The legislature may well have been in the possession of facts indicating a practice on the part of carriers for hire to employ their drivers for long hours, while it may also have had before it evidence that such was not the practice among the owners of trucks used for other purposes. We may take judicial notice of the fact that trucks not used by common or contract carriers create a substantial amount of traffic over the highways but we cannot take judicial notice of the conditions of employment in those industries. In other words, instances of the employment of truck-drivers for excessive hours may occur only sporadically and then under circumstances of emergency in industries of this latter sort, while excessive hours of service may be a regular practice in the business of transporting goods for hire. At least, upon the basis of facts judicially known, we cannot say that the existence of such a situation could not have been found by the legislature, and under these circumstances its classification must be allowed to stand. *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, — U. S. —.

Similar considerations support the exemption from the provisions of the act of "motor vehicles not principally engaged in the transportation of property for hire." Exces-

sive hours of employment on vehicles so used may either be of such infrequent occurrence that regulation of them is unnecessary, or else it may have been the legislative judgment that regulations adequate to control persons regularly engaged in the business of common and contract carriers for hire by motor truck would bear upon persons not regularly so engaged with a weight disproportionate to any possible benefit which might thereby accrue to the public. Whether, under our constitution, frequency and extent of operation may alone provide a sufficient basis for classification we do not undertake to say, but they may properly be supporting reasons therefor when, as here, some other reason appears in conjunction with them.

In the case of local operations, in which from necessity the periods of driving must be frequently interrupted, it may well be that fatigue does not develop as rapidly or become as great as it does in a driver subjected to the monotony incident to long and uninterrupted trips. For this reason the legislature may reasonably have decided that local operations did not require any regulation at all while regulation was imperative as to operations covering greater distances.

We are therefore unable to say that the classifications contained in the act are not germane to its purpose, that they lack a "rational basis," or that all persons in the same class are not accorded similar treatment. It follows that the act is not unconstitutional.

The case principally relied upon by the company, (*Smith* v. *Cahoon*, 283 U. S. 553), is not in point. In that case the court was called upon to consider a state statute purporting to regulate carriers of property for hire by motor trucks in the interest of highway safety which excluded from its operation motor vehicles used to transport agricultural and dairy products and fish and oysters. In holding this classification arbitrary, without relation to the purpose of the act and hence unconstitutional, the court said: "But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters and those who carry for

hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities."

The distinction between the case cited and the one at bar is obvious. In the former, classification is based upon the kind of goods carried, and that without relation to the nature of those goods as inflammable, explosive, bulky or otherwise likely to create a hazard when in transit over the highway. In the case before us, on the other hand, the classification is upon the basis of the nature of the business of the owner of the vehicle and, as appears above, a classification upon this basis is not necessarily an arbitrary or unreasonable one. The above distinction between the *Smith* case and cases similar to the one before us was fully elaborated in *Aero Mayflower Tea Co.* v. *Georgia Public Service Commission,* 295 U. S. 285.

The company's next contention is to the effect that the state statute has been superseded by the federal Motor Carrier Act, 1935, 49 Stat. 543.

Briefly stated the record of events is as follows: The state statute under consideration became law on May 6, 1933. The administrative rulings, Circular No. 2, referred to above became effective on August 1, 1936. The violations thereof and of the statute for which the company's registration certificates were suspended occurred during the latter part of 1936 and the first three months of 1937.

The federal Motor Carrier Act, 1935, became law in August 1935, and in that act, *s.* 204 (a) (2), it is provided that the Interstate Commerce Commission "may establish reasonable requirements with respect to * * * maximum hours of service of employees." Pursuant to this permissive power that commission held hearings at various places during the year 1937, and on December 29 of that year rendered its decision. In this decision it established maximum hours of service for employees of both common and contract carriers for hire by motor vehicle which are substantially similar to those established in Laws 1933 *c.* 106, *s.* 8, and in addition it provided for the keeping and filing of records of service by such employees which are also substantially similar to the provisions of rule 4N mentioned above. By order of the Interstate Commerce Com-

mission its requirements in the above respects were not to become effective until July 1, 1938.

The violations of the state act for which the company was put upon trial occurred, therefore, during the interval between the passage of the federal act and action thereunder by the Interstate Commerce Commission. The question presented is whether or not, during that time, the operation of the state statute, as it affected interstate commerce, was suspended by the federal act.

Generally stated the rule is that reasonable nondiscriminatory state action under the police power may indirectly affect interstate commerce, but it may affect such commerce only until Congress in the exercise of its plenary power takes action which covers the field. *Oregon etc. Co.* v. *Washington,* 270 U. S. 87. Both the state and the federal government cannot occupy the same field at the same time, (*University Overland Express Co.* v. *Griffin, ante,* and cases cited), and the time when Congress preempts the field depends upon its intention.

Applying this rule of Congressional intention the Supreme Court of the United States in *Northern Pacific Railway* v. *Washington,* 222 U. S. 370, and *Erie Railroad Co.* v. *New York,* 233 U. S. 671, held that state regulations of the hours of service of train crews, in so far as they applied to employees upon trains moving in interstate commerce, were suspended upon the date of passage of a federal statute upon the subject. This federal statute was passed on March 4, 1907, but by its terms it was not to take effect until one year later. In holding that the state statutes were ineffective as to interstate commerce during that year the court said that Congress had manifested its intention to enter the field when it enacted the statute and that by postponing its effective date for a year it manifested an intention that the field should remain without regulation during that time.

The above cases are strongly relied upon by the company but we do not consider them to be in point. The reason for this is that the Hours of Service Act, (34 Stat. 1415), differs radically from the Motor Carrier Act, 1935. In the former Congress established the maximum hours of serv-

ice permitted and provided that the act should become operative one year from the date of its passage. In the latter Congress gave the Interstate Commerce Commission permission to fix the maximum hours of service and provided no date upon which the commission was required to put its rulings into effect. The cases establish that this difference is a material one.

In *Missouri Pacific Railway Co.* v. *Larabee Mills Co.*, 211 U. S. 612, 623, it is said that "the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens." In *Northwestern Bell Tel. Co.* v. *Nebraska State Railway Commission*, 297 U. S. 471, it was held that state regulations in respect to depreciation rates for property used by a telephone company in interstate commerce were not suspended by a federal statute giving the Interstate Commerce Commission authority to prescribe such rates "as soon as practicable." The court said, page 478, "The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates." See also *Smith* v. *Ill. Bell Tel. Co.*, 282 U. S. 133.

Upon the authority of the cases last cited we hold that t was not the intention of Congress to enter the field of regulation of hours of service of truck-drivers engaged in nterstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject. Whether that date was December 29, 1937, when those rulings were made, or whether it will not be until July 1, 1938, when they will go into effect, is a question not presented n the case at bar and one upon which we express no opinion. The violations of the state act charged against the

company occurred before either of those dates and so at a time when the state act was in full force and effect. This same result has been reached as to other similar regulatory features of the Motor Carrier Act, 1935. *L. & L. Freight Lines, Inc.*, v. *Railroad Commission of Florida*, 17 F. Supp. 13; *Werner Transportation Co.* v *Hughes*, 19 F. Supp. 425.

The company further contends that the commission is without statutory authority to promulgate rules and regulations for the enforcement of the act and that in consequence it cannot be punished for failure to conform to the provisions of rule 4N of Circular No. 2 of the Administrative Rulings referred to above.

The act does not in terms give the Public Service Commission authority to prescribe rules and regulations for the carriers to which it applies. A study of the act as a whole, however, makes it abundantly clear that the legislature intended to commit the enforcement of its provisions to the commission. In addition, the section of the act which limits hours of service, (s. 8), specifically provides that "The commission shall have authority to enforce the provisions of this section," and section 12 provides a punishment by fine for "violating the orders of the commission issued under the provisions of this act." These provisions taken together and considered in the light of the general scheme of the statute and the rule making power given to the commission in other phases of its activities, lead to the conclusion that although the commission is "an agency of limited powers and authority," (*Petition of Boston & Maine Railroad*, 82 N. H. 116) it was the legislative intention that the commission should enforce the provisions of this statute in the same way that it enforced its supervisory authority in other respects, *i. e.* by the promulgation of appropriate rules and regulations.

To construe the sentence quoted from section 8 otherwise than as above would be to hold that it gives to the commission only such powers of enforcement as are given by the general law to police officers. To say the least it seems unlikely that such was the intention of the legislature.

Rule 4N, after paraphrasing the provisions of section 8 of the statute, requires that each driver shall keep with

him while on duty a record of his hours of service on forms prescribed by the commission, and that copies of such records shall be kept by his employer. It also provides that these records shall be filed with the commission at the end of each month. These rules do not attempt to establish any broad "policy and standard for action," (*Ferretti* v. *Jackson*, 88 N. H. 296, 304; *Opinion of the Justices*, 88 N. H. 497), and so do not amount to an unconstitutional usurpation of legislative power by the commission. The rules are well calculated to aid the commission in the enforcement of the act and are a valid exercise by the commission of the powers given to it by the statute.

The company's next contention is that the Public Service Commission exceeded its statutory authority in suspending the company's registration certificates for violation of the commission's administrative rules. A sufficient answer to this contention is that it does not appear that the commission's order of suspension was based upon such violations rather than upon a violation of the statute itself.

The statute, (*s.* 11), gives the commission authority to suspend certificates of registration for violations of the provisions of the act. Section 12 as amended by Laws 1933, *c.* 169, *s.* 2, imposes a fine of not more than one hundred dollars for violation of "the provisions of this act or the orders of the commission issued under the provisions of this act." We need not consider the question of the power of the commission to punish under this latter section because it has imposed no fine. Instead it has suspended the company's certificates of registration. This is one of the punishments prescribed by the act for its violation and authority to suspend was clearly granted to the commission. Suspension of registration certificates is not a punishment provided for violation of the rules of the commission, and while there is evidence that the plaintiff had violated both the act and the administrative orders, there is nothing to show that the commission based its order of suspension upon a violation of the latter rather than upon a violation of the former. To assume without evidence that it had disobeyed the statute by imposing the suspension for a violation of its orders rather than for a violation of

the act would be to assume that the commission had disregarded the clear wording of the statute. This is an assumption we are not compelled to make.

It is established law in this jurisdiction that, in the absence of indications to the contrary, a general finding includes a finding of all the special facts necessary to sustain it. *Spaulding* v. *Mayo*, 81 N. H. 85; *Bean* v. *Quirin*, 87 N. H. 343, 350, and cases cited. We see no reason why this principle applicable to the findings of inferior courts is not also applicable to the Public Service Commission when acting judicially, and, applying it to the order of the commission before us, we conclude that the suspension of registration which the commission imposed upon the company was for the violation by it of the provisions of the statute and that its violations of the administrative orders were either not found or were permitted to pass without punishment.

The evidence before the commission of the company's violation of the statute by requiring or permitting its drivers to operate its trucks for illegally excessive hours was in the form of reports filed under the provisions of rule 4N by a few of the drivers. The company does not, nor may it, complain of the informality with which this evidence was presented. P. L. *c.* 238, *s.* 10; *State* v. *New Hampshire Gas & Electric Co.*, 86 N. H. 16, 31. Its complaint is that this evidence provides an insufficient basis for the order of suspension for the reason that it does not show that the company "required or permitted" its drivers to operate for excessive hours; that it does not show that driving in excess of the statutory limits occurred in New Hampshire rather than in other states in which the drivers served; and that it fails to reveal that such excess hours of operation did not occur under circumstances of emergency or upon a truck under the control of two licensed operators.

The evidence contained in the reports on file with the commission show not only periods of employment for longer hours than the statute permits, but they also show repeated instances of such excessive hours and the oral testimony given before the commission by the company's local manager showed that the drivers were paid on an hourly basis.

Under these circumstances it would be little short of preposterous to say that the company had no knowledge of the hours of its drivers' employment. It would be equally preposterous to find that the drivers when operating over the statutory limits were acting outside the scope of their employment; that they were engaged upon a frolic of their own. The obvious inference from the testimony is that the company not only permitted but also even arranged its trips so as to require that its drivers serve beyond the statutory limit of hours of service.

Proof that some of the company's drivers operated for hours in excess of statutory limit in this state is contained in the inferences which may be drawn from their reports. These reports indicate that some of the drivers lived in Manchester and that their tours of duty after excessive hours of operation ended there. Obviously to have completed such a period of service within this state they must of necessity have operated illegally within its borders. The fact that some of the hours of service which went to make up the statutory limit occurred outside the state is not material. There is no violation of the statute until an operator has reached the limit of hours of operation allowed. The offense consists in operating thereafter, and such violation could findably have occurred within the state.

The other respects noted above in which it is claimed that the evidence is deficient relate to matters peculiarly within the company's knowledge. If such facts existed it was the province of the company to offer evidence of their existence, (*State* v. *Foster*, 23 N. H. 348; *State* v. *Lapointe*, 81 N. H. 227; *State* v. *Bozek*, 81 N. H. 277), and full opportunity was given to it to do so.

Since the days specified for the suspension of the company's certificates have passed, the commission may amend its order by specifying other days upon which its order of suspension shall be operative.

Appeal dismissed.

All concurred.

FILE COPY

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Supreme Court Of The United States

OCTOBER TERM, 1938.

No. 295.

H. P. WELCH COMPANY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE.

APPELLANT'S BRIEF

I.

Report of Opinions Below

The report and order of the Public Service Commission of New Hampshire in this case are reported in 19 N. H. P. S. C. 443; also R., *p.* 4.

The opinion of the Supreme Court of New Hampshire has not yet been officially reported, but has been unofficially reported in 199 Atlantic 886; also R., *p.* 26.

II.

Statement of the Case.

This cause comes before the Supreme Court of the United States on direct appeal, by virtue of the provisions of section 344 (a) of title 28 of the United States Code, from a decree of the Supreme Court of New Hampshire affirming an order of the Public Service Commission of the same state. The appellant alleges that a statute of The State of New Hampshire is repugnant to the Constitution and laws of the United States.

On April 13, 1937, the Public Service Commission of New Hampshire issued to the appellant, H. P. Welch Company, an

order to show cause why its common and contract carrier registrations to transport property for hire by motor vehicle between points within New Hampshire, should not be suspended or revoked because of alleged violations of *Session Laws of 1933, c.* 106, *s.* 8, limiting the hours of service of truck drivers. A hearing was held before the Commission on May 10, 1937, at which the case against the appellant was prosecuted by counsel for the appellee, The State of New Hampshire.

The appellant and appellee, with the approval of the Chief Justice of the Supreme Court of New Hampshire, have agreed that the following facts were established at this hearing. (R., *p.* 3).

The appellant is a corporation organized under the laws of Massachusetts and is engaged in both interstate and intrastate commerce as a common and contract carrier of freight by motor truck over the public highways of Massachusetts and New Hampshire. (R., *p.* 1). In 1937 the appellant, pursuant to the provisions of *Session Laws of 1933, c.* 106, *s.* 2 and 3, registered twenty trucks with the Public Service Commission for the common and contract carriage of property for hire between points within New Hampshire. (R., *p.* 1). The appellant has terminals at Boston in Massachusetts and at Manchester, Concord, and Claremont, in New Hampshire; and approximately ninety-nine percent of its business is interstate in character. (R., *p.* 1). During January, 1937, the hours of service records filed with the Commission by appellant's employee, Philip Chevrette, indicated that he had operated one of the appellant's motor trucks more than twelve consecutive hours without relief on the route between Manchester, New Hampshire and Boston, Massachusetts. (R., *pp.* 1, 2). Similar hours of service records filed by appellant's employee, Roland Rousseau, indicated that he had operated one of appellant's motor trucks more than twelve consecutive hours without relief on the "loop route" from Manchester, New Hampshire through Lawrence and Lowell, Massachusetts to Nashua, New Hampshire. (R., *p.* 2). The records also showed similar instances of continuous employment in

excess of twelve hours for appellant's employee, A. Demers, operating on the route between Manchester, New Hampshire and Boston, Massachusetts. (R., *p.* 2). In all the operations in which the alleged violations occurred interstate shipments were being carried on appellant's trucks. (R., *p.* 2). It was the practice of the appellant to carry intrastate shipments on these routes, whenever offered for carriage, but there was no specific evidence at the hearing that any intrastate shipments were being carried in the operations in which the alleged violations occurred. (R., *p.* 2).

The Commission by report filed on December 11, 1937, found the appellant guilty of violating the provisions of *Session Laws of 1933, c.* 106, *s.* 8, limiting the consecutive hours of service of motor truck drivers to twelve hours. (R., *p.* 2). The Commission ruled that the hours of service provisions of the above chapter applied to the appellant's operations in interstate commerce. (R., *pp.* 8-17). As a penalty for the alleged violations, the Commission, pursuant to the authority vested in it by *s.* 11 of the above chapter, ordered the suspension of any and all registration certificates of the appellant to transport property for hire by motor vehicle between points within New Hampshire, either as a common or contract carrier, for a period of five days. (R., *p.* 2).

The appellant thereupon seasonably moved for a rehearing which was denied December 22, 1937. (R., *p.* 2). The appellant then appealed from said report and order to the Supreme Court of New Hampshire, in accordance with the provisions of *Public Laws of New Hampshire, c.* 239. Among the grounds alleged for the appeal were the following:

> "1. The statute prescribing maximum hours of labor (Sect. 8, Ch. 106, Laws 1933) upon which said report and order are based does not apply equally to all owners and drivers of motor vehicles operated for the transportation of property on the highways of this state. It applies only to owners and drivers operating motor vehicles for the transportation of property for hire and discriminates against them by imposing burdens and restrictions which

are not applicable to other owners and operators of motor vehicles engaged in the transportation of property on the highways of this state. The statute denies to the H. P. Welch Company the equal protection of the laws guaranteed by the Bill of Rights and the Constitution of New Hampshire and by the Fourteenth Amendment to the Constitution of the United States and is of no force and effect.

"2. The alleged violations of said statute (Sect. 8, Ch. 106, Laws 1933) * * * occurred while the said H. P. Welch Company and its employees were engaged in interstate commerce. The power to regulate interstate commerce is by the Constitution of the United States (Sect. 8, Art. 1) vested in the Congress, which has exercised this power as to motor carriers engaged in interstate commerce by the 'Motor Carrier Act, 1935', which, with the regulations made pursuant thereto, supersedes said Ch. 106, as amended by Ch. 169, Laws of 1933, in so far as the provisions thereof might apply to interstate commerce." (R., *pp.* 2, 3).

The Supreme Court of New Hampshire by opinion and decree handed down June 7, 1938, dismissed the appeal. The appellant's motion for rehearing, was denied June 21, 1938. (R., p. 3).

On July 14, 1938, the appellant's petition for an appeal to the Supreme Court of the United States, pursuant to the provisions of section 344(a) of title 28 of the United States Code, was allowed by the Chief Justice of the Supreme Court of New Hampshire. The Chief Justice at the same time granted a supersedeas, suspending the execution of the order of the Public Service Commission pending the determination of the appeal.

III.

Specification of Errors.

1. The Supreme Court of The State of New Hampshire erred in its decision in the above entitled cause in holding that sections 3, 4 and 8 of chapter 106 as amended by chapter 169, *Session Laws of 1933*, do not deny to the appellant the equal protection of the laws as guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of The State of New Hampshire erred in its decision in the above entitled cause in holding that sections 8 and 11 of chapter 106 as amended by chapter 169, *Session Laws of 1933*, as applied to the appellant's operations in interstate commerce, were not superseded and rendered void by the enactment of section 304 (a) of title 49 of the United States Code.

IV.

Argument.

1. *Sections 3, 4 and 8 of Chapter 106 as amended by Chapter 169 of the Session Laws of 1933 deny to the appellant the equal protection of the laws and are repugnant to section one of the Fourteenth Amendment to the Constitution of the United States.*

Chapter 106 of the *Session Laws of 1933* was enacted to provide a comprehensive system for the regulation of motor carriers of freight for hire on the highways of New Hampshire. Under the provisions of section 2 of this chapter common carriers by motor vehicle between points within New Hampshire are required to register their motor trucks with the Public Service Commission and submit to rate regulation. Section 3 lays down the same requirements for contract carriers. Contract carriers are defined by this section as follows:

> "3. Contract Carrier Registration. The term contract carrier as used in this section shall include every person, firm or corporation transporting property for hire on any public way in this state, other than common carriers, those transporting products of their own manufacture or labor and those exempted in section 4 of this act. * * *"

Section 4 of this chapter, to the extent here relevant, provides as follows:

> "4. Exemptions. There shall be exempted from the provisions of this act:
>
> I. Motor vehicles not principally engaged in the transportation of property for hire.

> II. Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period. * * *"

Section 8 prescribes limitations on the hours of service of truck drivers and to the extent here relevant is as follows:

> "8. Hours of Service. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty. * * * The commission shall have authority to enforce the provisions of this section."

Section 11 prescribes the penalties for violations of the provisions of this chapter.

The provisions of section 8, limiting the hours of service of motor truck drivers as construed, do not apply to "those transporting products of their own manufacture or labor" nor to those motor carriers specifically exempted by section 4 of this chapter. *H. P. Welch Co.* v. *State*, —— N. H. ——; 199 A. 886; R. *p.* 28. The appellant contends that the exemption of certain classes of motor carriers from the operation of section 8 is discriminatory and denies to it the equal protection of the laws guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

The principles of constitutional law which are applicable to this issue do not require any great elaboration. The equal-protection clause of the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification "must be

reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Colgate* v. *Harvey*, 296 U. S. 404, 422. But discriminations are not to be supported "by mere fanciful conjecture." "They cannot stand as reasonable if they offend the plain standards of common sense." *Hartford Steam Boiler Co.* v. *Harrison*, 301 U. S. 459.

As interpreted by the Supreme Court of New Hampshire, the express purpose of section 8, limiting the hours of service of motor truck drivers, is "to protect users of the highways from the dangers likely to result to them from the operation thereon of trucks under the control of drivers suffering from fatigue." *H. P. Welch Co.* v. *State*, ——N. H. ——; 199 A. 886, 889; R., p. 30. The appellant contends that the discrimination, which is made between those motor carriers exempted from the operation of section 8 and a motor carrier such as the appellant, has no fair and substantial relation to highway safety.

Sections 3 and 4 (I) of chapter 106 exempt from the hours of service limitation persons transporting products of their own manufacture or labor and persons operating motor trucks "not principally engaged in the transportation of property for hire." By virtue of these sections the hours of service of all drivers employed by private motor carriers and "shipper-owners" are left unregulated. Nevertheless, it is a matter of general knowledge that the traffic of such motor carriers is large and that their fatigued drivers present the same hazards to the highway public as those of common and contract motor carriers, subject to section 8. Manufacturing and distributing establishments, chain stores, and wholesale and retail concerns in recent years have made increasing use of the highways for importation and exportation of supplies and products, using their own vehicles for these purposes. In 1932 the Interstate Commerce Commission estimated that, of the total freight tonnage carried by all classifications of motor trucks in the United States, fifty per cent is carried by "shipper-owners" and private carriers, as distinguished from com-

mon and contract carriers. *Re Coordination of Motor Transportation* 182 I.C.C. 263, 407. A traffic survey covering thirty-four states, prepared in 1936 for the Interstate Commerce Commission by the U. S. Bureau of Public Roads, indicated that sixty per cent of all truck drivers were employed by "shipper-owners" and private carriers. *Re Maximum Hours of Service*, 3 M.C.C. 672. In 1927 the U. S. Bureau of Public Roads published a trunkline traffic survey of New Hampshire which indicated that the use of trunkline highways by common and contract motor carriers totaled 12,700 truck-miles per day or 17.3 per cent of the total truck traffic, and that the use of the same highways by private motor carriers including "shipper-owners" totaled 60,800 truck-miles per day or 82.7 per cent of the total truck traffic. *Report of a Survey of Transportation on the State Highways of New Hampshire*, (U. S. Bureau of Public Roads, 1927) page 49. Indeed, in its biennial report to the legislature in 1934, the Public Service Commission of New Hampshire, in discussing the legislation now under review, said.

> "The line of demarcation between public and private carriers in this field is extremely tenuous * * *." *Statistical Report of the Public Service Commission*, XXIV, part 13, page 20.

These various surveys confirm what is already a matter of general knowledge, that private motor carriers and "shipper-owners" contribute a substantial part of the total truck traffic and mileage. Since a large part of the total truck traffic and mileage arises from such motor carriers, the drivers employed by such carriers present the same problems as drivers of common and contract motor carriers. Drivers of such motor carriers are just as susceptible to fatigue from long hours of employment as other truck drivers, and when fatigued constitute the same hazard to the traveling public as the fatigued truck drivers of other types of carriers. Furthermore, the profit motive which induces long hours of employment is just as prevalent among private motor carriers, including corporations "transporting

products of their own manufacture or labor", as it is among common and contract motor carriers.

The classification created by sections 3 and 4 (I) is not based upon the size of the vehicle, the weight of the load, the extent and regularity of traffic or any other factor bearing on highway safety. Instead it is based upon whether or not the load is being carried for hire under terms of common or contract carriage. If the load is not carried for hire or is a product of the carrier's own manufacture or labor, then the carrier is not subject to section 8. But if the load is carried for hire under terms of common or contract carriage, the carrier is subject to section 8. It is the appellant's contention that this classification is unconstitutional because its basis bears no fair relation to highway safety.

Section 4 (II) of chapter 106 exempts from the hours of service limitation all motor carriers, whether private, common or contract, "operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or * * * operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period." Here again it is a matter of general knowledge that the amount of truck traffic thus exempted is a substantial percentage of the total truck traffic on the public highways. The estimate of the United States Bureau of Public Roads, which has been accepted by the Interstate Commerce Commission, is that one-half of the total truck mileage in the United States arises from intra-city carriage. *Re Coordination of Motor Transportation*, 182 I. C. C. 263, 400. The drivers of motor carriers operating exclusively within cities and towns, if overworked, constitute just as much of a hazard to the traveling public as the fatigued drivers of other motor carriers; and perhaps even more of a hazard, because safe driving in city traffic requires a more alert mind.

It is therefore apparent that the classification of motor carriers found in sections 3 and 4 of the New Hampshire statute is not based upon extent or regularity of traffic, and consequently bears no relation to the purpose of the statute to promote high-

way safety. This classification is like that condemned by the Supreme Court of the United States in *Smith* v. *Cahoon*, 283 U. S. 553. That case involved a Florida statute regulating motor carriers in the interest of highway safety, but exempting from such regulation motor carriers transporting specified products. The Court said:

> "But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant was wholly arbitrary and constituted a violation of the appellant's constitutional rights. 'Such a classification is not based on anything having relation to the purposes for which it is made.'"

Where the class of motor carriers exempted from highway safety regulations makes only occasional use of the highways, a classification exempting it may be reasonable. A state legislature is entitled "to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative." *Continental Baking Co.* v. *Woodring*, 286 U. S. 352. How far a legislature "may relieve a special group of carriers on the filing of a bond for the safety of the public may depend on very different considerations, as, for instance, the extent or regularity of the traffic thus excepted." *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285. However, in the case at bar "the extent and regularity" of the motor carrier traffic exempted from the operation of the hours of service limitation is generally known to be large in proportion to the extent and regularity of all motor carrier traffic.

In the opinion delivered in the court below, affirming the validity of the classification in the New Hampshire statute, reliance was placed on the cases of *Bekins Van Lines* v. *Riley*, 280 U. S. 80; *Alward* v. *Johnson*, 282 U. S. 509; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Sproles* v. *Binford*, 286 U. S. 374; and *Hicklin* v. *Coney*, 290 U. S. 169. But those cases are not in point, for in all of them the exemption of a certain class of motor carriers from highway safety regulations was held valid because the classes of carriers exempted made infrequent use of the highways. In the case at bar the classes of motor carriers exempted from regulation are generally known to make constant and extensive use of the highways.

The appellant respectfully submits that the classification of motor carriers contained in sections 3 and 4 of chapter 106, *Sessions Laws of 1933*, is arbitrary and unreasonable and denies to the appellant the equal protection of laws guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States. There is "no fair reason for the law which would not require with equal force its extension to others whom it leaves untouched." *Watson* v. *Maryland*, 218 U. S. 173.

2. *Sections 8 and 11 of Chapter 106 as amended by Chapter 169 of the Session Laws of 1933, as applied to interstate commerce, are inoperative, having been superseded by the "Motor Carrier Act of 1935."*

Section 8 of chapter 106, *Session Laws of 1933*, reads, to the extent here relevant, as follows:

> "8. Hours of Service. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off

duty. * * * The commission shall have authority to enforce the provisions of this section."

Section 11 of chapter 106 prescribes penalties for violation of the chapter and more particularly provides as follows:

"11. Revocation. The commission shall have authority, after notice and hearing, to suspend or revoke any registration certificate issued in accordance with the provisions of this act for violation of the provisions of this act."

In 1935 the Congress of the United States enacted the so-called "Motor Carrier Act of 1935" (49 U.S.C., ss. 302-327) which placed the field of interstate motor carriers under the jurisdiction of the Interstate Commerce Commission. By the provisions of this act (49 U.S.C., s. 304a), the Interstate Commerce Commission is given the following power and duty:

"304(a). Powers and duties generally. It shall be the duty of the Commission— (1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees * * * (2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees * * *."

The Interstate Commerce Commission upon its own motion began an investigation of the maximum hours of service of motor carrier employees by order dated July 30, 1936. This investigation extended over nearly eighteen months, and on December 29, 1937, the Commission issued its first regulations on the subject, to take effect July 1, 1938. The Commission ruled that its authority over hours of service was limited to matters concerned with highway safety. *Re Maximum Hours of Service*, 3 M.C.C. 665. The whole proceeding was reopened by order of the Commission, dated April 4, 1938, and a second report and order were issued on July 12, 1938, postponing the effective date of these

regulations until October 1, 1938. *Re Maximum Hours of Service,* 4 M.C.C.——. On September 26, 1938, the proceeding was again reopened for further hearing, and the Commission postponed the effective date of the hours of service regulations for common and contract carriers of property until December 31, 1938. *Re Maximum Hours of Service,* 5 M.C.C.——. It is here that the matter now rests.

The alleged violations by the appellant of the New Hampshire statute limiting the hours of service of truck drivers occurred in 1937 (R., *p.* 1). There were in effect at that time no regulations of the Interstate Commerce Commission pertaining to the maximum hours of service of motor carrier employees, although as indicated above the Commission then had that subject under investigation.

At the hearing before the Public Service Commission of New Hampshire in May, 1937, the appellant's truck drivers, Chevrette and Demers, were shown to have driven on several occasions for more than twelve consecutive hours without relief, while operating appellant's trucks on the route between Boston, Massachusetts and Manchester, New Hampshire. (R., *pp.* 1, 2). The appellant's driver, Rousseau, was also shown to have exceeded the limit placed upon continuous hours of service by section 8 of chapter 106, while operating on the "loop route" so-called, from Manchester, New Hampshire through Lawrence and Lowell, Massachusetts to Nashua, New Hampshire. (R., *p.* 2). In all these operations by appellant's drivers, Chevrette, Rousseau and Demers, interstate shipments were being carried on board the trucks. (R., *p.* 2).

It is apparent, therefore, that all the operations in which the alleged violations of section 8 of chapter 106, *Session Laws of 1933,* occurred, constituted interstate commerce. The routes traveled were interstate in character, and interstate shipments were being transported. There was no specific evidence that any intrastate shipments were being carried at the time when the alleged violations occurred, although it was customary for the appellant to carry occasional intrastate shipments over parts

of its interstate routes. (R., *p.* 2). However, even if some intrastate shipments were being carried at the time when the alleged violations occurred, the situation would not be altered. On this point the case of *Northern Pacific Railway Co.* v. *Washington,* 222 U. S. 370, is decisive. In that case a train was carrying both interstate and intrastate freight, and the question before the Court was whether the federal or the Washington hours of service act applied to the train crew. The Court said,

> "This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."
>
> To the same effect, see *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612.

However, despite the interstate character of these operations of appellant's motor trucks, the Public Service Commission of New Hampshire held that section 8 of the New Hampshire statute was applicable and had been violated. The New Hampshire Commission further decided that the enactment by Congress of the "Motor Carrier Act of 1935" had not disturbed its own authority, because the Interstate Commerce Commission had not, at the time when the alleged violations occurred, exercised its power to prescribe maximum hours of service for employees of interstate motor carriers. *Re H. P. Welch Company,* 19 N.H.P.S.C. 443, 455, 456; R. *pp.* 8-17.

In the Supreme Court of New Hampshire, the same view of law was taken. The Court said,

> "Upon the authority of the cases last cited we hold that it was not the intention of Congress to enter the field of regulation of hours of service of truckdrivers engaged in interstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject." *H. P. Welch Co.* v. *State,*——N. H.——; 199A. 886, 892; R., *p.* 34.

The appellant contends that the enactment of the "Motor Carrier Act of 1935", in and of itself, served to supersede and render inoperative section 8 of the New Hampshire statute, so far as it purported to regulate the hours of service of motor truck drivers engaged in interstate commerce. The "Motor Carrier Act of 1935" recognized the necessity for Federal regulation of hours of service of employees of interstate motor carriers and gave the Interstate Commerce Commission complete jurisdiction over that subject. After the enactment of the Motor Carrier Act, no regulation of hours of service prescribed by any other authority could be effective to regulate motor carriers of interstate commerce. The fact that the Interstate Commerce Commission had not seen fit to exercise its authority at the time when the alleged violations of the New Hampshire act occurred, has no bearing upon the construction of the "Motor Carrier Act of 1935". That act was intended to occupy the field of regulation of hours of service of truck drivers engaged in interstate commerce. The wide scope of authority over motor carriers, conferred on the Interstate Commerce Commission leads to the conclusion that its jurisdiction in this field was intended to be exclusive. The enactment of the Motor Carrier Act was intended to clear the field of all state legislation inconsistent with that act, thus leaving the Interstate Commerce Commission with authority to act in any way that the public welfare directed. Thus if the Commission, after investigation, concluded that no regulation of hours of service in the interstate motor carrier industry was desirable, its conclusion could easily be made effective.

The "Motor Carrier Act of 1935" confers jurisdiction over interstate motor carriers upon the Interstate Commerce Commission, in the following words:

> "(b) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation; and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission." (49 U.S.C. *s.* 302b).

The language of this section explicitly confers exclusive power over interstate motor carriers upon the Interstate Commerce Commission. The next section of the act (49 U.S.C., s. 302c) makes exceptions in favor of state authority, in the following words:

> "(c) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Still another section of the act (49 U.S.C., s. 316e) makes a further exception in favor of state authority, as follows:

> "Provided, however, That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce, or for any other purpose whatever."

In only these two sections of the "Motor Carrier Act of 1935" did Congress manifest any intention of preserving the authority of the states. Therefore these two sections mark the limits of state power over interstate motor carriers, for the presumption is that if Congress had intended, in addition, to preserve state authority over the maximum hours of service of employees of interstate motor carriers until the effective date of the Interstate Commerce Commission's regulations of that subject, it would have plainly said as much. *United States* v. *Hubbard*, 266 U. S. 474, 479, 480. Indeed, in the debates on this act in the United States Senate, an amendment was rejected which would have expressly affirmed the power of the states to enact highway safety regulations, not discriminatory against interstate commerce, for all motor carriers (79 Congressional Record, part V, pages 5735, 5737).

There is, moreover, another compelling reason why Congress must have intended the enactment of the "Motor Carrier Act of

1935" to supersede all state regulations of the maximum hours of service of employees of interstate motor carriers. By the provisions of the Motor Carrier Act, the Interstate Commerce Commission is given the power to regulate the rates of interstate motor carriers; and all such carriers are required to file tariffs with the Commission (49 U.S.C., ss. 316, 317). Regulation of the maximum hours of service of employees of motor carriers has a direct bearing upon the cost of operations in that industry. There is no uniformity in the laws of the several states regulating hours of service of motor carrier employees. If the diverse state laws were allowed to control the hours of service in the interstate motor carrier industry after the enactment of the Federal Motor Carrier Act, fair regulation of the rates of such interstate motor carriers would be exceedingly difficult, for the costs of operation of such carriers would vary from state to state. It is evident, therefore, that Congress intended to establish uniformity of regulation in the interstate motor carrier industry and, to that end, vested complete authority over all phases of that industry in the Interstate Commerce Commission.

The case of *Northern Pacific Railway Co.* v. *Washington,* 222 U. S. 370, is almost directly in point with the case at bar. That case concerned the Federal hours of service act for railway employees (34 Stat. at L. 1415) which was approved March 4, 1907, with the proviso that it should not take effect until one year after its passage. In July, 1907, the Northern Pacific Railway permitted some of its employees, engaged in interstate commerce within the State of Washington, to remain on duty in excess of the sixteen hour limit established by a Washington statute. Action was thereupon instituted in the Washington courts to assess a penalty against the defendant railroad. In reversing the decision of the Washington Supreme Court, the Supreme Court of the United States held that the defendant was not subject to regulation by the state, because Congress had asserted its exclusive authority by its enactment relating to the hours of service of railway employees. The fact that the act of Congress had not taken effect at the time when the alleged viola-

tion of the Washington statute occurred was held to make no difference. The Court said,

> "We are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary * * * that the right of a state to apply its police power for the purpose of regulating interstate commerce in a case like this exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State."

See also, *Erie Railway Co.* v. *New York*, 233 U. S. 671.

Another case directly in point with the case at bar is that of *Napier* v. *Atlantic Coastline Railroad Co.*, 272 U. S. 605. That case concerned the Federal Locomotive Boiler Inspection Act (43 Stat. at L. 659) under which the Interstate Commerce Commission was given authority to prescribe regulations concerning the equipment of locomotives. The Supreme Court of the United States held that the Federal act precluded the enforcement of a Georgia statute prescribing an automatic door for locomotive fire-boxes, even though the Interstate Commerce Commission had as yet issued no regulations concerning locomotive fire-box doors. The Court said,

> "The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of authority conferred upon the commission leads to that conclusion. Because the standard set by the commission must prevail, requirements by the states are precluded, however commendable or however different their purpose."

A parallel question was presented in the case of *Oregon-Washington Railroad and Navigation Co.* v. *Washington*, 270 U. S. 87. In that case the State of Washington undertook to establish a quarantine upon plants and animals shipped in interstate commerce. The Supreme Court of the United States held that by act of Congress, the exercise of the power of quarantine was vested in the United States Secretary of Agriculture and that state quarantine legislation was thereby precluded. The Court further said,

> "It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act, there is no invalidity in state action. Such construction as that cannot be given to the Federal statute. The obligation to act, without respect to the states, is put directly upon the Secretary of Agriculture whenever quarantine in his judgment is necessary. When he does not act it must be presumed that it is not necessary. With the Federal law in force state action is illegal and unwarranted."

To the same effect see *Missouri R. R. Co.* v. *Porter*, 273 U. S. 341, and *L. & L. Freight Lines* v. *Railroad Commission*, 17 Fed. Supp. 13, 15.

In its report of this case below, the Public Service Commission of New Hampshire emphasized the argument that if the appellant's contention was accepted, the field of hours of service in interstate motor transportation would be left unregulated. The answer to this argument is not difficult to suggest, for as Mr. Justice Brandeis said in *Napier* v. *Atlantic Coastline Railroad Co.*, 272 U. S. 605, 613,

> "If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

In the opinion delivered below, the Supreme Court of New Hampshire relied on the cases of *Missouri Pacific Railway Co.* v. *Larabee Mills*, 211 U. S. 612, and *Northwestern Bell Telephone Co.* v. *Nebraska*, 297 U. S. 471, as authority for the proposition

that the enactment of the "Motor Carrier Act of 1935" did not render inoperative the sections of the New Hampshire statute now under review. The first of these cases, *Missouri Pacific Railway Co.* v. *Larabee Mills*, was virtually overruled in the case of *Oregon—Washington Railroad and Navigation Co.* v. *Washington*, 270 U. S. 87 at 102. The second of these cases, *Northwestern Bell Telephone Co.* v. *Nebraska*, is scarcely in point. That case involved the power of a state to establish depreciation rates for the property of a telephone company pursuant to the regulation of intrastate telephone rates. It was held that the state had such power even though the Interstate Commerce Commission had been given authority to establish depreciation rates over some of the same property in furtherance of the regulation of interstate telephone rates. The main point of difference between that case and the one at bar is that in the former the state was attempting to regulate intrastate commerce over which its authority was plain, while in the latter the state is attempting to regulate interstate commerce.

The appellant respectfully submits that sections 8 and 11 of chapter 106, *Session Laws of 1933*, as applied to interstate commerce, are inoperative, having been superseded by the "Motor Carrier Act of 1935"; and that consequently the decree of the Supreme Court of New Hampshire in this case ought to be reversed.

Respectfully submitted,

H. P. WELCH COMPANY,
By its attorneys,
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Laurence I. Duncan,
Robert W. Upton.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 295

H. P. WELCH COMPANY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

THOMAS P. CHENEY,
Attorney General of New Hampshire;
FRANK R. KENISON,
Assistant Attorney General;
DUDLEY W. ORR,
Counsel for Appellee.

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SUPREME COURT, STATE OF NEW HAMPSHIRE

1938 TERM

H. P. WELCH COMPANY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,

Appellee.

STATEMENT OPPOSING JURISDICTION.

Pursuant to Rule 12, paragraph 3, Rules of Supreme Court of the United States comes now The State of New Hampshire, appellee in the above entitled case and discloses the following matter making against the jurisdiction of the Supreme Court of the United States as asserted in a statement of the basis of appellate jurisdiction filed by the appellant on the 14th day of July, 1938.

Statement of the Case.

The appellants herein are common and contract carriers by motor vehicle who do business in New Hampshire that is both interstate and intrastate. Appellants violated a State statute prohibiting operation of motor vehicles upon the highways of the State by drivers who had been on continuous duty more than twelve hours (New Hampshire Laws 1933, Ch. 106, s. 8) after the enactment of the Federal Motor Carrier Act (49 Stat. 543, 49 U. S. C. A. 301-327) but before

the Interstate Commerce Commission had promulgated its requirements as to maximum hours of service of employees, and consequently before any federal regulation of hours of service was in effect. The State statute (New Hampshire Laws 1933, Ch. 106, ss. 3 and 4) excluded from its operation certain classes of carriers among whom appellants do not fall.

As punishment for violation of the State statute, the State Public Service Commission suspended the right of appellants to do an *intrastate* business in New Hampshire for a period of five days. The New Hampshire Supreme Court dismissed the appeal of the appellant wherein it urged the same objections to the State statute that it presents to this Court. The right of appellants to carry on an interstate business has not been restricted by the State except as the regulation of its intrastate operations may touch and effect appellant's interstate business. The *Motor Carrier Act* expressly reserves the regulation of intrastate motor vehicle operations to the States. 49 U. S. C. A. Sec. 302 (c) provides:

> "Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

The validity of the State statute in the absence of Federal regulation is not challenged.

Argument.

I. The contention that the State statute violates the "equal protection clause" of section one of the Fourteenth Amendment is utterly lacking in merit. The exemptions

granted by the statute are found in New Hampshire Laws, 1933, Ch. 106, ss. 3 and 4.

> "3. *Contract Carrier Registration.*—The term contract carrier as used in this act shall include every person, firm or corporation transporting property for hire by motor vehicle on any public way in this state, other than common carrriers, those transporting products of their own manufacture or labor and those exempted in section 4 of this act. * * *
>
> "4. *Exemptions.*—There shall be exempted from the provisions of this act: I. Motor vehicles not principally engaged in the transportation of property for hire. II. Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any third-day period. III. Motor vehicles while engaged exclusively in work for any branch of the government of the United States or for any department of this state, or for any county, city, town or village. IV. Motor vehicles engaged exclusively while in the delivery of the United States mail."

Exemptions of this character or ones even more arbitrary have been sustained by this Court.

> "The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the class of operations, which by reason of their habitual and constant use of the highways, brought about the conditions making regulation imperative." *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 373.

Packard v. *Banton*, 264 U. S. 140; *Bekins Van Lines, Inc.* v. *Riley*, 280 U. S. 80; *Alward* v. *Johnson*, 282 U. S. 509; *Sproles* v. *Binford*, 286 U. S. 374; *Hicklin* v. *Coney*, 290 U. S. 169; *South Carolina State Highway Department* v. *Barnwell Bros. Inc.*, — U. S. —, 82 L. Ed. 469.

II. The issue presented in this case of whether or not the Federal regulation of interstate commerce supersedes the State law touching the same subject matter has been decided by this Court repeatedly in accordance with the decision below. At the time of the violations for which appellants were prosecuted the regulations of the Interstate Commerce Commission were not only not effective but they were not even in existence. In such a situation it is beyond debate that there is no supersedure.

The Federal Motor Carrier Act did not envisage an immediate adoption of hours of service regulations by the Interstate Commerce Commission. The fact is that Federal regulation will not become effective until almost exactly three years after the enactment of the Motor Carrier Act *Ex Parte No. MC-2.* Interstate Commerce Commission. Congress did not intend to free the motor carrier industry from all control of hours of service until the Interstate Commerce Commission could act administratively to prescribe hours of service.

Northwestern Bell Tel. Co. v. *Nebraska State Railway Commission*, 297 U. S. 471; *Smith* v. *Ill. Bell Tel. Co.*, 282 U. S. 133; *Missouri Pacific Railway Co.* v. *Larabee Mills Co.*, 211 U. S. 612.

It is, therefore, submitted that this appeal should be dismissed or the judgment below should be affirmed.

Respectfully,

THOMAS P. CHENEY,
Attorney General of the State of New Hampshire;
FRANK R. KENISON,
Assistant Attorney General;
DUDLEY W. ORR,
Counsel for Appellee.

SUPREME COURT, STATE OF NEW HAMPSHIRE

1938 TERM

H. P. WELCH COMPANY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,

Appellee.

MOTION TO DISMISS OR AFFIRM.

Now comes The State of New Hampshire, the appellee herein by Thomas P. Cheney, its duly appointed qualified and acting Attorney General, and moves the Supreme Court of the United States to dismiss with costs the appeal taken herein to it by the H. P. Welch Company, appellant, upon the following ground:

(1) It is manifest that the only Federal questions raised by the said appeal have been so explicitly decided by the Supreme Court of the United States in accordance with the decision of the Supreme Court of the State of New Hampshire as to foreclose further argument on the subject.

In the alternative appellee moves this Court to affirm the judgment from which the appeal in the above entitled cause purports to have been taken on the following ground:

(1) It is manifest that the decision of the Supreme Court of the State of New Hampshire dismissing the appeal of

appellant from the Public Service Commission of the State of New Hampshire is correct.

THOMAS P. CHENEY,
Attorney General;
FRANK R. KENISON,
Assistant Attorney General;
DUDLEY W. ORR,
Counsel for Appellee.

Service of the within motion to dismiss or affirm and of the foregoing and attached statement opposing jurisdiction acknowledged this twenty-eighth day of July, 1938.

ROBERT W. UPTON,
Counsel for Appellant.

A true Copy. Attest:

GEORGE O. SHORN,
Clerk of the New Hampshire Supreme Court.

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CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States

October Term, 1938

No. 295

H. P. WELCH COMPANY,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF OF APPELLEE

THOMAS P. CHENEY,
Attorney General of New Hampshire

DUDLEY W. ORR,
Attorneys for Appellee.

JOHN E. BENTON,
of Counsel

The Concord Press, Concord, N. H.

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In the Supreme Court of the United States

October Term, 1938

No. 295

H. P. WELCH COMPANY,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,
Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This appeal from a final decision of the Supreme Court of The State of New Hampshire (*H. P. Welch Company* v. *State*, 89 N. H. , 199 Atl. 886) presents two issues:

1. Do Sections 3 and 4 of Chapter 106 of New Hampshire Laws of 1933 deprive the appellant corporation of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by establishing certain exemptions from the regulatory provisions of an act relating to carriers of property for hire on the public highways?

2. Are the provisions of Section 8 of Chapter 106 of New Hampshire Laws of 1933 relating to the operation of motor vehicles for hire on the highways of the State by drivers who have been on duty for more than twelve hours in conflict with Section 204 (a) of the Motor Carrier Act of 1935, 49 Stat. 546, 49 U.S.C.A. 304 (a) and therefore repugnant to the commerce clause of the Constitution of the United States?

The New Hampshire statute relating to carriers of property for hire on the public highways was enacted May 6, 1933 to take effect July 1, 1933. The Motor Carrier Act of 1935 was approved August 9, 1935 to take effect and be in force on and after the first day of October 1935. On April 13, 1937 the Public Service Commission of The State of New Hampshire ordered the appellant company to show cause why its common and contract carrier registrations should not be revoked for requiring or permitting its drivers to operate its motor vehicles for the carriage of property for hire on the highways of New Hampshire after the drivers had been continuously on duty for more than twelve hours. (R. 1). In all the operations in which the alleged violations occurred there were being carried on the trucks some interstate shipments, but it was the practice of the appellant to carry intrastate shipments on the same trucks. (R. 2). After a hearing on May 1, 1937, the State Commission, on December 11, 1937, (R. 1, 2), found the appellant guilty of the alleged violations during the latter part of 1936 and early 1937 (R. 1, 2), and suspended appellant's registrations to operate in intrastate commerce in New Hampshire for a five day period. (R. 2). At the hearing it appeared that appellant does both an intrastate and an interstate business over public highways in New Hampshire. (R. 1).

Thereafter on December 29, 1937, the Interstate Commerce Commission issued an order approving, adopting and prescribing rules and regulations in the matter of maximum hours of service of motor carrier employees effective July 1, 1938. Interstate Commerce Commission, 3 Motor Carrier Cases 665, 690. Appendix II. The Commission has twice postponed the effective date of its rules and regulations since issuing its original order and if the date is not put off again they will become effective December 31, 1938. Interstate Commerce Commission: *Ex parte No. MC 2* July 12, 1938, September 26, 1938.

At no point in this proceeding has appellant challenged the validity of the New Hampshire statute under the com-

merce clause, Constitution of the United States Article I. § 8, clause three, as either imposing an undue burden on interstate commerce or discriminating against it in the absence of Federal legislation touching the same subject matter. (R. 2, 25).

SUMMARY OF THE ARGUMENT

I. The New Hampshire Court correctly held that the New Hampshire Statute does not deprive appellant of the equal protection of the laws.

A. The first classification in favor of persons transporting produce owned or manufactured by their own labor is lawful.

B. The next exemption in the statute of motor vehicles not principally engaged in the transportation of property for hire violates no provision of the Constitution.

C. The final exemption embracing motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten mile limit on occasional trips not exceeding two trips in any thirty day period is reasonable.

II. The Court below did not err in holding that the State Statute had not been superseded by the Motor Carrier Act of 1935.

A. The Motor Carrier Act does not prevent the States from regulating intrastate commerce and the order of the Public Service Commission of New Hampshire is a regulation of intrastate commerce alone.

B. But if the New Hampshire Statute does touch and affect interstate commerce, until Congress acts the states may adopt reasonable regulations govern-

ing interstate and intrastate motor vehicle traffic alike which are calculated to protect the lives and property of their citizens.

C. The mere enactment of the Motor Carrier Act of 1935 by Congress did not supersede the New Hampshire law.
   1. The state law and the rules and regulations promulgated pursuant to the federal statute do not deal with the same subject matter.
   2. Congress has no power to regulate matters purely of local concern under the guise of regulating commerce.
   3. Yet if it should be held that Congress has assumed to act in a field traditionally reserved to the states, partial regulation under Federal authority does not exclude state action from the same field.

ARGUMENT

I.

THE NEW HAMPSHIRE COURT CORRECTLY HELD THAT THE NEW HAMPSHIRE STATUTE DOES NOT DEPRIVE APPELLANT OF THE EQUAL PROTECTION OF THE LAWS.

The classifications established by the statute rest upon reasonable and substantial grounds of distinction. So long as differences in treatment proceeding from exemptions in a statute are not capricious or arbitrary there is no denial of the equal protection of the laws. These well established principles apply with particular force to legislative endeavors to regulate the use of the public highways. Differences in the physical contour of the land over which roads are built and variations in the width, grade and curvature of the way itself are equalled only by the infinite variety of motor vehicles passing to and fro across the roads of the nation. Accordingly, legislatures have generally taken account of the differences in operation and public risk grow-

ing out of the multitude of distinct types of motor vehicles using the highways. The use of some vehicles has been burdensome and dangerous; the traffic of others has been infrequent and safe. Most legislative action has taken reasonable account of the distinctions. This choice is not lightly to be disregarded. As this court observed in *Sproles* v. *Binford,* 286 U. S. 374, 388:

> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."
>
> *Hodge et als* v. *Cincinnati,* 284 U. S. 335;
> *Morf* v. *Bingaman,* 298 U. S. 407.

It is interesting to note that the Federal Motor Carrier Act, 49 Stat. 545, 49 U.S.C.A. 303(b) contains as to certain of its provisions other than hours of service all the exemptions criticized here in the State statute and many more besides. The State statute presents three classifications to which the appellant objects and which in substance are of a sort frequently reviewed by this court.

A. *The First Classification in Favor of Persons Transporting Produce Owned or Manufactured by Their Own Labor is Lawful.*

Without doubt the legislature considered that the use of the highways by such people would neither expose the roads themselves to such use and wear nor the public to such danger to life and limb as the use of people like the appellant who make the highways their place of business. It is established that common carriers by motor vehicle in interstate commerce may properly be charged an extra tax for their special use of the highways. *Clark* v. *Poor,* 274 U.S. 554, 557. Again it has been said with reference to classification for tax purposes

> "that the legislature may graduate the fees according to the propensities of the vehicles to injure or to destroy the public highways, and may exempt those with respect to which this tendency is slight or nonexistent, cannot be doubted . . . It is for the legislature to draw the line between the two classes." *Carley & Hamilton, Inc. et al* v. *Snook*, 281 U. S. 66, 72.

In the case of *Continental Baking Company* v. *Woodring*, 286 U. S. 352 it appeared that a Kansas statute regulating the whole field of commercial motor vehicle transport exempted from its requirements the transportation of live stock and farm produce to market by the owner thereof or supplies for his own use in his own motor vehicle. This classification was held to be constitutional because the use of highways for the transportation of farm products by the owner is casual, infrequent and incidental. To extend the exemption in favor of all persons transporting their own products whether they are farm products or not is but to include within the exemption every person in the same classification. The distinction between casual, infrequent and incidental use and habitual and continual use is not destroyed thereby. In the case of *Hicklin* v. *Coney*, 290 U. S. 169, a provision of a South Carolina statute regulating motor vehicle contract carriers was considered. That statute exempted farmers and dairymen hauling farm and dairy products for compensation. Persons hauling their own products in their own motor vehicles as in this case and the *Woodring* case, supra, were not within the statute at all. This court remarked that the exemptions in the *Hicklin* case were not as limited as the ones in *Continental Baking Company* v. *Woodring* but held that the exemption as construed by the state court to apply only to farmers and dairymen who do occasional hauling was not unconstitutional. This case is clearly authority to declare that the New Hampshire exemption that persons transporting products of their own manufacture and labor is *a fortiori* not a denial of the equal protection of the laws.

Aero Mayflower Transit Company v. *Georgia Public Service Commission*, 295 U. S. 285.

The case of *Smith* v. *Cahoon*, 283 U. S. 553 should be distinguished. In that case the object of the statute was the protection of the traveling public from negligent motor vehicle operation. An exemption therefrom depended upon a classification of the cargo carried without any reference whatever to the likelihood that the cargo would cause the injury that the statute was designed to guard against. So long as the cargo of a truck is not of itself dangerous like inflammable products or explosives, the danger to the highways and the people using them is just as great if the cargo happens to be farm products, fish or oysters as it would be if the load were bread or sugar, tea or coffee. If it could have been shown, as it has been in this case, that the classification had a reasonable relation to the object of the statute the result would have been different as the court pointed out in *Aero Mayflower Transit Company* v. *Georgia Public Service Commission*, supra.

B. *The Next Exemption In The Statute, of Motor Vehicles Not Principally Engaged In The Transportation of Property For Hire Violates No Provision of the Constitution.*

Such an exemption has several times been presented here. The uniform holding has been that it does not deny the equal protection of the laws. It was said in *Packard* v. *Banton*, 264 U. S. 140, 144:

> "The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper."

In that case an objection was raised to a New York statute because it did not require private operators to furnish the same liability insurance as that required from persons in

the business of carrying passengers for hire in motor vehicles. The objection was not sustained because this court held the classification to be constitutional. In *Bekins Van Lines* v. *Riley,* 280 U. S. 80 it appeared that the state of California levied a tax at a different and more burdensome rate upon carriers over regular routes and between fixed termini than it did upon other carriers by motor vehicle both common and private. This court held the statute to be constitutional and remarked at page 82 that

> " . . . marked distinction exists between common and private carriers by auto vehicles . . . , "

and the court further said on the same page,

> "Their [the objecting parties] use of the highways probably will be regular and frequent and, therefore, unusually destructive thereto; also it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers."

Another case sustaining a classification based upon heavy use of the highways is *Alward* v. *Johnson,* 282 U. S. 509, 513 where the court said

> "the distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough."

To the same effect is *Hicklin* v. *Coney,* supra.

The appellant argues that the foregoing classifications are invalid because the total volume of "shipper-owner" or private carrier traffic is large. The reasoning is fallacious because the appellant ignores the fact that the total number of "shipper-owners" or private carriers may be proportionately greater than the traffic moved by them. In other words, to show that the carriers subject to the New Hampshire act move only a part of the total traffic by no means demonstrates that *as a class* they do not create a greater

risk to the public safety than private carriers *as a class*. The exempted groups may contribute to the evil against which the legislature acted, but it is quite clear that on the whole their enhancement of highway risks must be less than that of a class whose business is highway travel. The pressure of competition, moreover, is less upon the private carrier than it is upon the carrier who makes transportation his business. Although the business of a private carrier may be competitive, transportation usually will be only incidental to some primary activity in which the stress of competition largely will be felt. With the common or contract carrier, however, tendencies to short cut safety and labor costs will appear directly as enhanced risks upon the public highway. Different treatment of the shipper-owner and the private carrier is, therefore, justified.

C. *The Final Exemption Embracing Motor Vehicles Operating Exclusively Within The Limits of a Single City or Incorporated Town or Within Ten Miles of the Limits thereof or Motor Vehicles Operating Beyond Such Ten Mile Limit on Occasional Trips Not Exceeding Two Trips in Any Thirty Day Period Is Reasonable.*

The necessity for regulation may be much less within the limits of a city than it is upon the trunk lines traversing sparsely settled territory. Cities commonly maintain extensive police establishments to regulate traffic within their limits and equally specialized highway or engineering departments to repair and keep up the physical property. The requirements of separate communities may differ and a legislature may well conclude that it is desirable to preserve local authority to regulate traffic. How far beyond the actual bounds of the city this area of local control should be limited is a question of drawing a line that should be left to the legislature so long as its determination is within reason. In *Continental Baking Company* v. *Woodring*, supra, an exemption of this sort was considered and approved. It was there pointed out that the "penumbra of

town" may extend even to twenty-five miles from its limits. It is impossible to say that differences between local and through traffic with respect to operation and traffic conditions do not present a reasonable basis for classification. *Atlantic Coast Line Railroad* v. *Georgia,* 234 U. S. 280; *Sproles* v. *Binford,* supra; *Aero Mayflower Transit Company* v. *Georgia Public Service Commission,* supra.

II.

THE COURT BELOW DID NOT ERR IN HOLDING THAT THE STATE STATUTE HAD NOT BEEN SUPERSEDED BY THE MOTOR CARRIER ACT OF 1935.

A. *The Motor Carrier Act does not Prevent the States From Regulating Intrastate Commerce and the Order of the Public Service Commission of New Hampshire is a Regulation of Intrastate Commerce alone.*

Section 202 of the Motor Carrier Act is entitled "Declaration of Policy and Delegation of Jurisdiction". It provides in part, Sec. 202(c):

> "Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof".

The New Hampshire commission merely suspended the appellant's registration certificates "to lawfully transport property for hire in motor vehicles between points within this state either as a common or contract carrier". (R. 2, 23). Its interstate business was unaffected.

The act of the New Hampshire Commission was not an attempt to regulate interstate commerce indirectly. It is a permissible inference that in the course of the operations

when violations of the state law occurred intrastate commerce was involved. (R. 2). Part of appellant's business is intrastate. Had the New Hampshire Commission refused to grant an intrastate registration to appellant on request because of alleged violations of the New Hampshire statute in a business hitherto exclusively interstate a different case would be presented. It would be different in this essential particular, the state would be using its power to regulate intrastate commerce to govern the business of the appellant in interstate commerce. In accordance with established principles such regulation would be bad. *Western Union Tel. Co.* v. *Foster,* 247 U. S. 105, 114; *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583. Here, on the contrary, there is no such regulation. The state has merely suspended a right to do a kind of business over which it has full control because appellant has failed to observe in its conduct of that kind of business lawful local regulations. The appellant does not do an exclusively interstate business and the hours when its drivers, after twelve hours on duty, drove over New Hampshire highways may have been hours of doing intrastate as well as interstate business. So long as the direct object of regulation is intrastate commerce and so long as Congress is silent or, as here, has granted plenary authority over intrastate commerce, it is immaterial that the exercise of state power has a substantial indirect effect on interstate commerce. *Minnesota Rate Cases,* 230 U. S. 352, 402. Even if it should be held that the Motor Carrier Act became effectve in every respect on October 1, 1935, therefore, it would not avail the appellant. The Act expressly reserves all control over intrastate commerce to the states and the New Hampshire Commission has done no more than to act under the power reserved.

Northern Pacific Ry. Co. v. *Washington,* 222 U. S. 370 is not in point. The federal statute involved there contained no such reservation of state power as that expressly set out in Section 202(c) of the Motor Carrier Act set out above. Language in that case applicable to state control over intrastate commerce has no proper application here.

B. ***But if the New Hampshire Statute Does Touch*** *and Affect Interstate Commerce, Until Congress* ***Acts the States May Adopt Reasonable Regulations Governing Interstate and Intrastate Motor*** *Vehicle Traffic Alike Which Are Calculated to Protect the Lives and Property of Their Citizens.*

Control of the use of the highways for such a purpose is not a matter requiring uniform treatment throughout the nation.

> "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse." *South Carolina Highway Dep't* v. *Barnwell Brothers,* 303 U. S. 177.
>
> "Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases,* 230 U. S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to oc-

> cupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly* v. *Washington*, 302 U. S. 1, 9;

Townsend v. *Yeomans*, 301 U. S. 411.

The "grave dangers incident to the operation of motor vehicles" and the dangerous character of the machines themselves have thoroughly established the proposition that

> "In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens." *Morris* v. *Duby*, 274 U. S. 135, 143;

Hendrick v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *Clark* v. *Poor*, supra; *Hodge et al* v. *Cincinnati*, supra; *Continental Baking Co.* v. *Woodring*, supra; *Sproles* v. *Binford*, supra; *Bradley* v. *Public Utility Commission*, 289 U. S. 92; See: *Sprout* v. *South Bend*, 277 U. S. 163, and as to the power of the state to deal with the specific problem of hours of service in the absence of congressional action. *Northern Pacific Ry. Co.* v. *Washington*, *Supra*. It is the plain implication of this case that state regulation of the hours of labor of the employees of interstate carriers is lawful until Congress acts.

It should be made plain that the appellant has not challenged the statute as a direct burden on interstate commerce or as a discrimination against such commerce. The

authorities cited above clearly establish that a regulatory statute like the present one neither directly burdens interstate commerce nor discriminates against it. Even if the question were not otherwise foreclosed, the failure of the appellant to set forth this ground of objection to the statute in his statement as to jurisdiction would prevent its consideration now. *Bradley* v. *Public Utility Commission*, supra, at page 97.

C. *The Mere Enactment of the Motor Carrier Act of 1935 by Congress Did Not Supersede the New Hampshire Law.*

1. ***The state law and the rules and regulations promulgated pursuant to the federal statute do not deal with the same subject matter.*** The hours of service regulations adopted by the interstate commerce commission are found in Interstate Commerce Commission Reports, 3 Motor Carrier Cases, 665, 690 and on page 29 of an appendix to this brief. The material portions of the state statute are set out on pages 5 and 6 of the record and it is printed in full beginning on page 33 hereof. Comparison of the federal regulations with the state statute reveals that the provisions adopted under authority of the Motor Carrier Act were confined to the length of time that individuals operating motor carriers in interstate commerce should work whether they drive or not. The New Hampshire statute, on the contrary, is indifferent to hours of labor as such. Its only concern is that no one shall drive who has been continuously on duty for more than twelve hours. In short, the federal regulation governs the operation and equipment of the instrumentalities of interstate commerce and the hours of service of the individuals working with them; the state law protects the people of New Hampshire from injury to person and property by tired drivers. It regulates driving only and leaves hours of service wholly unregulated. An employee of a motor carrier might work forever without rest and violate no provision of the New Hampshire law so long as he did not drive after having

been exposed to the risk of undue fatigue. To this extent the heading of Section 8 of the New Hampshire law is a misnomer and it should be regarded as nothing more than what it obviously was intended to be, a heading for convenience.

Section 204 (a) of the Motor Carrier Act authorizes the Interstate Commerce Commission to establish reasonable requirements with respect to qualifications and maximum hours of service of employees. Section 8 of Chapter 106 of New Hampshire Laws of 1933 has no such limiting application so far as highway safety is concerned as "employee". The word there used is "driver", a term of much broader scope for it includes owner operators and other independent carriers who are the employees of no one. It is somewhat surprising to see that the Interstate Commerce Commission adopted it in its regulations despite the limitation of its authority to "employees" in the statute.

This difference is further proof that the two laws do not deal with the same subject. In a young and highly competitive industry like the motor carrier business employees must be protected against the abuse of unduly long hours of labor. This is the primary aim of the federal hours of service regulations. The regulations of the Interstate Commerce Commission cannot expand the word "employee" in the statute by abandoning it in favor of the word "driver" in its regulations. The Interstate Commerce Commission as well as the legislature of New Hampshire may have recognized that the danger to the public is as great from tired operators who are not employees as it is from ones who are. Such recognition by the Commission does not alter the fact that Congress elected to deal only with the problem of protecting the employee and left the broader protective field to the states.

The foregoing construction of the statutes is buttressed by the principle that where the matter is in doubt the solution will be preferred that does not raise grave constitutional questions.

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware & H. Co.*, 213 U. S. 366, 408. *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217.

2. *Congress has no power to regulate matters purely of local concern under the guise of regulating commerce.* The appellant contends for such a broad construction of the Motor Carrier Act that this serious issue is necessarily raised. To one view anything that exists or happens in the nation may remotely or indirectly affect interstate commerce. Such possibilities are not enough to sustain the exercise of Congressional authority where the subjects of regulation are essentially matters of local concern and divorced from interstate commerce. *Hammer v. Dagenhart*, 247 U. S. 251; A.L.A. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; *Carter* v. *Carter Coal Co.* 298 U. S. 238. In the case of *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.* 301 U. S. 1, 37 in which the federal statute was sustained it was nevertheless acknowledged that the power of Congress is limited. The Court said:

"Undoubtedly the scope of this power [the commerce power] must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. . . . The question is necessarily one of degree.

In this case appellant urges a breadth of Congressional power that might authorize the appellant to defy the command of a stop light erected under state authority, render

its agents immune from prosecution under the common law of many states for the crime of manslaughter if their reckless driving happened to be in interstate commerce, and direct it to operate its heavy vehicles at a rate of speed not only dangerous to the public highway and persons and property upon or adjoining it but also contrary to every locally tested canon of reasonableness. Neither the Safety Regulations, Interstate Commerce Commission, 1 Motor Carrier Cases 1, nor the Hours of Service Regulations, supra, should be considered as manifestations of national power to take from the states the exercise of such an essentially local function as the routing of traffic on the city streets. Local ordinances to prevent accidents at crossings, to safeguard pedestrians, to avoid the congestion of streets and to provide access to the retail shops of local merchants have such a remote and indirect effect on interstate commerce that Congress has no power to set them aside so long as they are non-discriminatory, reasonable efforts to protect the local welfare. Congress has not assumed such a sweeping dominion over purely local affairs. Its action must be limited to the proper object of national solicitude, the hours of service and the safety of operations and equipment of the employees of interstate carriers. The public is no more than the incidental beneficiary of this legislation. Its protection is left to the states. Thus the apparent conflict between the national and local statute in this case is resolved and each may be effective in its legitimate sphere. Much clearer expressions of Congressional intent than exist in the Motor Carrier Act should appear before it is held that Congress has tried to destroy the police power of the states, to make all interstate traffic violations federal offenses and to leave interstate carriers free to flout all local regulations. The construction of the Motor Carrier Act now urged avoids the necessity of passing on the validity of such an attempt.

The operation of a Federal statute should not be extended by implication to supersede a legitimate exercise of the state police power directly aimed to protect the lives and

property of its citizens in a sphere most efficiently governed by local regulation.

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." *Illinois Central R. R.* v. *Public Utilities Commission*, 245 U. S. 493, 510 and cited cases.

Of the serious dangers to interests generally shielded by state protection there is no doubt. *Hess* v. *Pawloski*, 274 U. S. 352. It is likewise true that the chief problem of motor vehicle operation, protection against accidents, is ordinarily a local one. *Bradley* v. *Public Utilities Commission*, supra at page 95.

3. *Yet if it should be held that Congress has assumed to act in a field traditionally reserved to the states, partial regulation under Federal authority does not exclude state action from the same field.* *Reid* v. *Colorado*, 187 U. S. 137; *The Minnesota Rate Cases* (*Simpson* v. *Shepard*) supra; *Savage* v. *Jones*, 225 U. S. 501; *Mintz* v. *Baldwin*, 289 U. S. 346. The court has recently said that where the State exercises its power to protect the lives and health of its people the application of the principle elaborated in the foregoing cases is fortified. *Kelly* v. *Washington*, supra at page 13. In view of the deadly character of automobile traffic the present case is without doubt in the group where this court will find most reluctantly that state power is at an end.

A rule that the existence of federal legislation, under which the subject of a state statute may some day be regulated, of itself, without such regulation in fact, supersedes the local law would have the most unfortunate practical consequences. It might often leave violent and dangerous

activities without any restraint at all. In the present case, for example, there were during 1936, the first year after the Motor Carrier Act became law, six hundred and eleven employees of the Interstate Commerce Commission stationed outside Washington. *Statistical Abstract of the United States (1937) p. 154.* At the same time there was in the continental United States three million nine thousand sixty-six miles of rural highway traversed by four million twenty-four thousand trucks and tractors moving among more than twenty-four million other motor vehicles. *Statistical Abstract of the United States (1937)* pp. 357, 363. Not all the trucks and tractors engaged in interstate commerce, it is true, but enough of them so moved to determine in a large measure the characteristics of highway travel. No doubt the staff of the Bureau of Motor Carriers of the Interstate Commerce Commission lately has been increased and now may approximate eleven hundred, but it is at least shocking to suggest that Congress intended at once to release interstate trucks from all state fetters and harness them with a corporal's guard not all of whom could possibly have been available for duty. There were in 1930 one hundred and thirty thousand policemen in the United States in addition to many thousand more detectives, inspectors and other enforcement officers. Fifteenth Census Vol. V. p. 20. It is common knowledge that a great part of the ordinary policeman's time is devoted to motor vehicle work. Comparison of this army of enforcement with the petty staff of the Interstate Commerce Commission shows the absurdity and the danger of supersedure until Federal regulation is effective.

Yet this is the rule for which the appellant argues. Because the Motor Carrier Act authorized the Interstate Commerce Commission to establish regulations governing safety of operation and hours of service and because the act was effective October 1, 1935, no interstate carrier could thereafter be convicted in a state court of speeding, of driving under the influence of liquor, of reckless driving or of driving after a long time on duty. It is hard enough

to contemplate the possibility that action by the Interstate Commerce Commission may divest the states of control in this familiar field; it goes beyond reason to say that the mere existence of federal legislation was a Congressional mandate that anarchy should prevail.

The appellant relies on the case of *Northern Pacific Ry.* v. *Washington, supra.* It is to be distinguished. The federal statute there involved was self executing. 34 Stat. 1415. Of itself it was complete. It established the hours of labor on trains moving in interstate commerce without the intervening device of administrative regulations. Although there was an interregnum between the date of the passage of the federal law and the consequent supersedure of state regulation and the time when it became effective, the Congressional scheme of control was complete when the act was passed. Quite unlike the present case, nothing remained to be done. Here Congress has recognized that the variety of traffic on the almost limitless web of public highways in the county would require years of thorough administrative investigation before its plan of regulation would be complete. The Motor Carrier Act is a direction to regulate, not itself a regulation.

Similarly another case advanced by the appellant to support its contentions presents facts essentially different from the ones found here. *Napier* v. *Atlantic Coast Line,* 272 U. S. 605. In that case, even though the Interstate Commerce Commission had made no specific orders covering fire box doors and cab curtains the Federal Locomotive Boiler Inspection Act, 36 Stat. 913 as amended, 38 Stat. 1192 and 43 Stat. 659 was a clear expression of Congressional intent to occupy the whole field of establishing requirements for the safe equipment of locomotives operating on interstate railways. There were in that Congressional act no such reservations and limitations as appear in the Motor Carrier Act. The reservation of power to regulate intrastate commerce by motor carriers has been pointed out already. Section 216 (e) of the Act forbids the Interstate Commerce Commission to prescribe any intrastate

rates whatever. Furthermore Congress recognized the local aspect of much of the motor carrier business. The administration of the Motor Carrier Act is to be one of cooperation between the Federal and State authorities. Section 202 (a). Under Section 205 (b) Congress requires the Commission to refer most cases in which not more than three states are involved to a joint board "composed solely of one member from each State" with assistants who may be appointed by the Interstate Commerce Commission. There is no doubt that Congress recognized that the public interest in uniform national regulation did not entirely overbalance the vital local concern in heavy use of the public highways. The States have a much greater stake in the control of highway traffic than they have in fire-box doors and cab curtains. They are things that but remotely affect the lives of a few citizens; highway traffic is the immediate hazard of almost every man. Consequently the *Napier* case is no authority for a decision in this case.

Even if the regulations of the Interstate Commerce Commission will, when effective, supersede the state law, there has been no supersedure in this case because the federal regulations were not in effect. It is a fact that the Hours of Service Regulations of the Commission insofar as they affect common and contract carriers of property and their employees will not be effective until December 31, 1938. Interstate Commerce Commission, *Exparte No. MC–2*, Sept. 26, 1938. There was, therefore, no effective federal regulation at the time of appellant's offense, its trial, or the hearing of its appeal by the State Supreme Court. The rules and regulations were first issued December 29, 1937 to be effective July 1, 1938. Interstate Commerce Commission, 3 Motor Carrier Cases 665. Even the date of issue was later than the offense of the appellant and its trial and the order of the New Hampshire Public Service Commission. The original date when the federal regulations were to become effective has been twice postponed since the original order of December 29, 1937. Interstate Commerce Commission, *Exparte No. MC–2*, July 12, 1938

and September 26, 1938. In a case of this kind there is no supersedure until federal regulation becomes effective. *Atlantic Coast Line R. R.* v. *Georgia,* supra; *Vandalia R. R.* v. *Public Service Commission,* 242 U. S. 255.

The mere grant of authority by Congress to the Commission to establish reasonable requirements with respect to hours of service of employees standing alone does not supersede state action. It is conceded that there is no supersedure until Congress acts. The delegation of Congressional authority alone is not enough; there must be some action under the delegated power. Authorization of an agent is not equivalent to performance. This principle is well recognized. *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612; *Smith* v. *Illinois Bell Tel. Co.* 133; *Northwestern Bell Telephone Company* v. *Railway Commission,* 297 U. S. 471. In the *Larabee* case it was said at page 623:

> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the State . . . In other words the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens."

In the case of *Smith* v. *Illinois Bell Tel. Co.*, supra, it was argued that the Illinois Commerce Commission had no jurisdiction over depreciation rates in connection with intrastate charges because the Interstate Commerce Act had superseded state action. The federal statute, 41 Stat. 493, 49 U.S.C.A. 20(5), provided that the commission should, as soon as practicable, prescribe for carriers subject to the Interstate Commerce Act (which included telephone companies) the classes of property for which depreciation charges may be included under operating expense and the percentage of depreciation for such classes of property. The statute then provided that the carriers should not charge to operating expense any depreciation charges on classes of property other than those prescribed by the Commission or charge a percentage of depreciation other than that prescribed by the Commission. This court held that the state regulation was not superseded because, although the Interstate Commerce Commission had the matter under consideration, a final determination had not been made. The case of *Northern Pacific Ry. Co.* v. *Washington,* supra, upon which appellant here relies was considered but found inapplicable. Until the Interstate Commerce Commission finally acted, the state prerogative to prescribe depreciation rates was not to be gainsaid. To the same effect is *Northwestern Bell Telephone Company* v. *Railway Commission,* supra at 480 where it was said:

> "In any event, we think that section 20(5) cannot be read as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates of telephone companies except by prescribing a rate administratively determined by the commission itself. A direction that the commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to permit the telephone companies to fix the rates for themselves in defiance of state power. The doubtful constitutionality of the statute so construed concludes our acceptance of such a construction".

Conclusion

For the reasons herein stated it is respectfully submitted that the New Hampshire statute does not deny appellant the equal protection of the laws and was not superseded at the time of appellant's offense by the Motor Carrier Act of 1935. The judgment of the court below should, therefore, be affirmed.

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APPENDIX I

EXCERPTS FROM THE MOTOR CARRIER ACT OF 1935

DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions, in such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

(b) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(c) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

SEC. 203 (b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service; or (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous mu-

nicipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business.

GENERAL DUTIES AND POWERS OF THE COMMISSION

SEC. 204 (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end

prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of sections 204 (d) and (e); 205· 220; 221; 222 (a), (b), (d), (f), and (g); and 224.

APPENDIX II

INTERSTATE COMMERCE COMMISSION

MOTOR CARRIER SAFETY REGULATIONS

Promulgated July 12, 1938

PART V.—HOURS OF SERVICE OF DRIVERS

Regulations prescribed under authority of section 204 (a), (1) and (2) of the Motor Carrier Act, 1935, with respect to maximum hours of service of drivers of motor vehicles operated in interstate or foreign commerce by common and contract carriers, including motor vehicles engaged in operations specified in section 203 (b) of said act, except paragraph (4a).

REGULATIONS EFFECTIVE OCTOBER 1, 1938

Rule 1

As used in these regulations:

(*a*) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails.

(*b*) The term "driver" means any individual who drives in transportation in interstate or foreign commerce any motor vehicle as defined in paragraph (a) above.

(c) A driver is on duty from the time he begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work. Time spent by a driver resting or sleeping in a berth as defined in paragraph (g) of this rule shall not be included in computing time on duty.

(*d*) The term "drive or operate" includes all time spent on a moving vehicle and any interval not in excess of 20

minutes in which a driver is on duty but not on a moving vehicle. It does not include time spent resting or sleeping in a berth as defined in paragraph (g) of this rule.

(*e*) The term "week" means any period of 168 consecutive hours beginning at the time the driver reports for duty, as defined in paragraph (c) of this rule.

(*f*) The term "24 consecutive hours" means any such period starting at the time the driver reports for duty, as defined in paragraph (c) of this rule.

(*g*) The term "berth" means a berth or bunk on the motor vehicle which is properly equipped for the purpose of sleeping, including springs and a mattress, or an innerspring mattress, pillow, adequate bed clothing, adequate ventilation, and ready means of entering and leaving the berth.

(*h*) Where any other terms used in these regulations are defined in section 203 (a) of the Motor Carrier Act, 1935, such definitions shall be controlling. Where terms are used in the regulations which are neither defined herein nor in said section 203 (a), they shall have the ordinary practical meaning of such terms.

Rule 2

Every motor carrier and his or its officers, agents, employees, and representatives shall comply with the following regulations, and every such motor carrier shall require that his or its officers, agents, employees, and representatives shall be conversant with these regulations.

Rule 3

(*a*) No carrier subject to these regulations shall permit or require any driver in his employ to remain on duty, as defined in paragraph (c) of rule 1, for a total of more than 60 hours in any week, as defined in paragraph (e) of rule 1; provided, however, that carriers operating vehicles on every day of the week may permit drivers in their employ to remain on duty for a total of not more than 70 hours in any period of 192 consecutive hours.

(*b*) No carrier subject to these regulations shall permit or require a driver in his employ to drive or operate a motor vehicle for more than 10 hours in the aggregate in any period of 24 consecutive hours, unless such driver be off duty for 8 consecutive hours during or immediately following the 10 hours aggregate driving and within said period of 24 consecutive hours; provided, however, that two periods of resting or sleeping in a berth, as defined in paragraph (g) of rule 1, may be cumulated to give the aforesaid total of 8 hours off duty.

Rule 4

No carrier subject to these regulations if himself a driver shall remain on duty or drive or operate for longer periods than those prescribed in rule 3 hereof for employed drivers.

Rule 5

Each carrier subject to these regulations, except carriers engaged in mass transportation and operating on frequent and regular schedules, shall require that a driver's log in duplicate shall be kept by every driver in his employ who operates a motor vehicle engaged in transportation in interstate or foreign commerce, and, if himself an owner-driver, shall keep such a log. Entries in said driver's log shall be made by the driver, and shall show the place of origin and destination of the trip, the times of reporting for duty and of going off duty, the periods of driving or operating and other work, and any other information found desirable.

Each carrier shall make monthly reports to the Bureau of Motor Carriers, Interstate Commerce Commission, Washington, D. C., prior to the fifteenth day of each succeeding month, of every instance where a driver has been required or permitted to be on duty or to drive or operate for hours in excess of those presribed by these regulations, and shall fully explain the reasons for and circumstances surrounding such violations. Such reports shall be in writing and sworn to.

Rule 6

In case of flood, storm, accident, or similar emergency, a driver may complete his run without being in violation of the provisions of these regulations, if such run would reasonably have been completed without violation except for the delay caused by such emergency.

Rule 7

These regulations shall not apply to any carrier subject thereto when transporting passengers or property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster.

APPENDIX III

NEW HAMPSHIRE LAWS 1933

CHAPTER 106 AS AMENDED BY CHAPTER 169, LAWS OF 1933 REGULATION OF CARRIERS OF PROPERTY FOR HIRE ON THE PUBLIC HIGHWAYS

Section		Section	
1.	Declaration of policy	7.	Name of owner
2.	Common carrier registration	8.	Hours of service
3.	Contract carrier registration	9.	Fees
4.	Exemptions	10.	Operation by railroads
5.	Change of rates	11.	Revocation
6.	Public record	12.	Penalty

1. Declaration of Policy. The business of operating motor vehicles transporting property for hire on the highways of this state affects the interests of the public. The rapid increase in the number of motor vehicles so operated, and the fact that they are not sufficiently regulated, have increased the dangers and hazards on public highways, and regulation of common carriers and contract carriers as hereinafter defined is necessary to the end that highways may be rendered safer for the use of the general public; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity and convenience of the shipper and receivers of freight, and that the various transportation agencies of the state may be correlated so that public highways may serve the best interest of the general public.

2. Common Carrier Registration. No person, corporation, partnership, association, railroad or railway company, shall operate any motor vehicle, not running upon rails or tracks, upon any public highway transporting property for hire as a common carrier, between points within this state, without first obtaining a registration certificate and special

number plates from the public service commission (hereinafter called the commission). Said applicant shall file with the commission the following: I. The schedule of rates to be charged applying to the service of transportation to be rendered. II. An indemnity bond or insurance policy which shall adequately provide for the reasonable protection of the owner or owners of the property transported. III. The routes over the highways within the state over which it is proposed to operate said motor vehicle or vehicles as common carriers. IV. The fees required as hereinafter provided. If the indemnity bond or insurance policy are satisfactory the commission shall issue a registration certificate and special number plates. In cases where a common carrier has been rendering a substantially uninterrupted service, the operation may lawfully be continued pending issuance of the certificate if application is made within fifteen days of the effective date of this act.

3. Contract Carrier Registration. The term contract carrier as used in this act shall include every person, firm or corporation transporting property for hire by motor vehicle on any public way in this state other than common carriers, those transporting products of their own manufacture or labor and those exempted in section 4 of this act. Whether or not any person, firm or corporation is so transporting property shall be a question of fact. No contract carrier shall operate any motor vehicle for the transportation of property for hire on any public way between points within this state without first obtaining a registration certificate and special number plates from the commission. If any contract carrier operates upon any public way in this state in competition with any common carrier or common carriers, such contract carrier shall file with the commission the rates, rules or regulations applying to such service provided, however, that such filing shall not be necessary if property is to be transported for any common carrier when the rates charged the public for the transportation of such property are filed with the commission.

4. Exemptions. There shall be exempted from the provisions of this act: *I.* Motor vehicles not principally engaged in the transportation of property for hire. *II.* Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period. *III.* Motor vehicles while engaged exclusively in work for any branch of the government of the United States or for any department of this state, or for any county, city, town or village. *IV.* Motor vehicles engaged exclusively while in the delivery of the United States mail.

5. Change of Rates. No common or contract carrier shall charge, demand, exact, receive or collect for any service rendered an amount greater or less than the rates on file with the commission, provided, however, that any such carrier holding a registration certificate may file new rates, rules and regulations or change the highways over which it gives service by filing notice thereof with the commission.

6. Public Record. The records relating to each registration of common and contract carriers under this act shall be kept on file at the office of the commission and shall be available to the public at all reasonable times.

7. Name of Owner. No motor vehicle shall be operated on the highways of this state transporting property for hire unless it has printed on both sides of said vehicle in plain, legible printing the name and address of the owner and the weight of the vehicle and the gross weight for which said vehicle is registered by the motor vehicle commissioner.

8. Hours of Service. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for

more than twelve hours, after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been on duty more than sixteen hours in the aggregate in any twenty-four-hour period, and when the driver has been on duty sixteen hours in any twenty-four-hour period it shall be unlawful for him to operate or for the owner thereof to require or permit him to operate a motor vehicle on the highways of this state until he shall have had at least ten consecutive hours off duty. Periods of release from duty herein required shall be given at such place and under such circumstances that rest and relaxation from the strain of the duties of the employment may be obtained. No period off duty shall be deemed to break the continuity of service unless it be for at least three consecutive hours at a place where there is opportunity for a rest. In case of an unforeseen emergency the driver or chauffeur may complete his run or tour of duty if such run or tour of duty, but for the delay caused by such emergency, would reasonably have been completed without a violation of this section. Provided, however, that the provisions of this section shall not apply to trucks while under the control of two licensed operators. The commission shall have authority to enforce the provisions of this section.

9. Fees. Each application for a registration certificate or special number plates for operation as a common carrier shall be accompanied by a fee of $5.00, except that the fee for the period ending December 31, 1933 shall be $2.50, such money to be used for the purpose of defraying the expenses of administering this act. A copy of said certificate and the special number plates shall at all times be displayed on each motor vehicle authorized by the com-

mission to operate under the provisions of the foregoing section. The charge for each additional plate and copy of registration certificate shall be $2.00. In the case of contract carriers the charge for registration certificate and special number plates shall be $2.00. Plates shall not be changed from one vehicle to another unless written notice thereof has been mailed to the commission. No certificate may be transferred or sold without the consent of the commission authorizing such transfer or sale. No certificate granted under this act shall be effective after the thirty-first day of December of the year of its issue. The renewals shall be issued upon application made in accordance with the Commission's requirements upon the payment of fees prescribed for original applications.

10. Operation by Railroads. A railroad operating motor vehicles not running upon rails or tracks upon the public ways, whether or not such operation is carried out by means of a subsidiary or subsidiary companies, shall be subject to the provisions of this act as to its rates and services, and as to such operation shall not be subject to the requirements contained in the statutes applying to common carriers by railroads as to rates and services.

11. Revocation. The commission shall have authority, after notice and hearing, to suspend or revoke any registration certificate issued in accordance with the provisions of this act for violation of the provisions of this act.

12. Penalty. Any person, corporation, partnership, association, railroad or railway company violating the provisions of this act or the orders of the commission issued under the provisions of this act shall be punished by a fine of not more than one hundred dollars, and the superior court shall have jurisdiction in equity to restrain any such violation upon petition of the commission, any public authority, or ten citizens of any city or town.

13. Takes Effect. This act shall take effect July 1, 1933.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 295.

H. P. WELCH COMPANY, *Appellant*,

v.

THE STATE OF NEW HAMPSHIRE, *Appellee*.

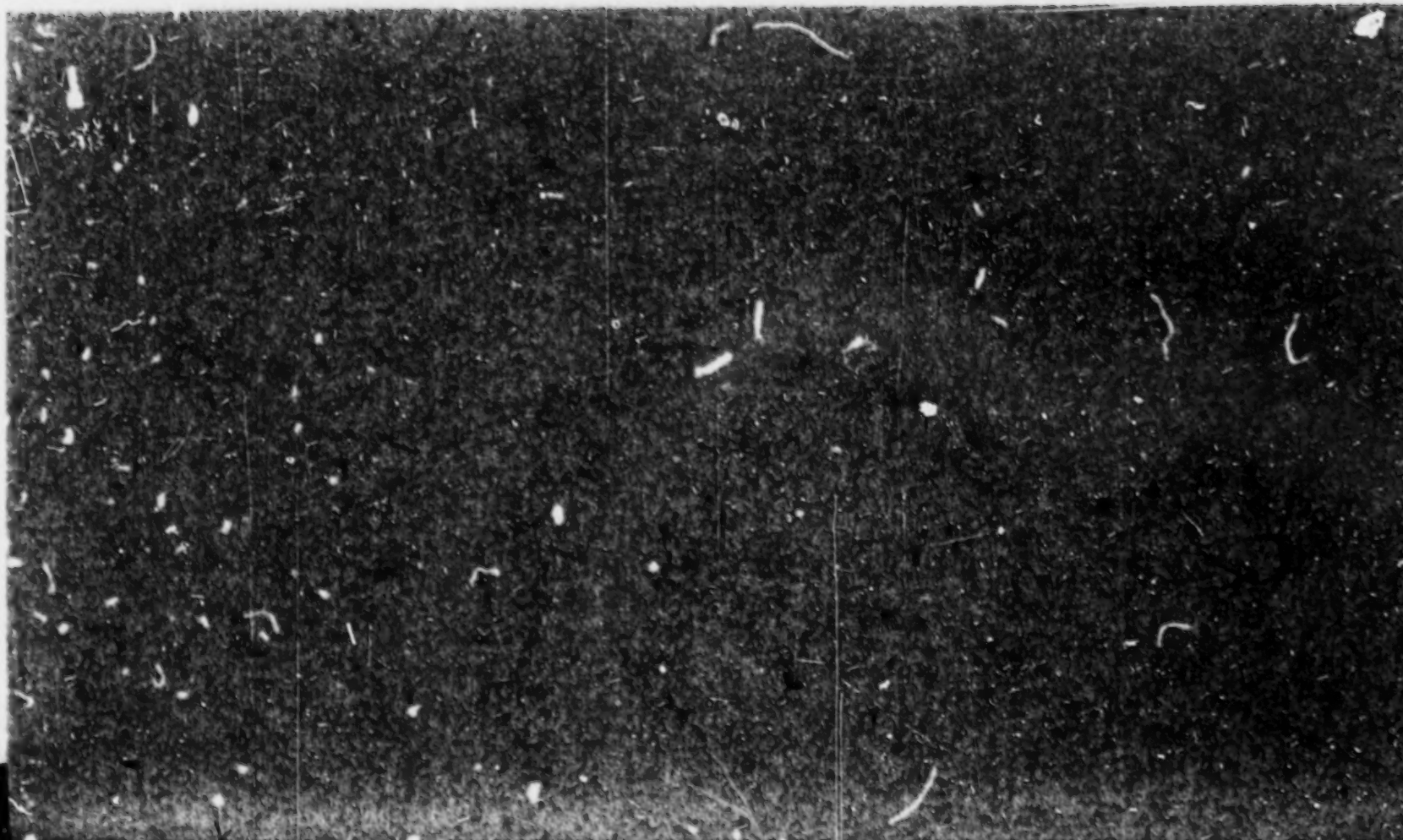
BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICUS CURIAE.

JOHN E. BENTON,
General Solicitor;

CLYDE S. BAILEY,
Assistant General Solicitor,
7411-15 New Post Office Bldg.,
Washington, D. C.

December 16, 1938.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 295.

H. P. WELCH COMPANY, *Appellant*,

v.

THE STATE OF NEW HAMPSHIRE, *Appellee*.

BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States, except Delaware, which has no state regulatory commission, and New York, the commissions of which are not at present actively identified with the Association.

By the constitution of the Association, the President of the Association and the Executive Committee, or either of them, may direct the General Solicitor to appear on behalf

of the Association (as distinguished from the particular commissions represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief, by leave of court, is filed on behalf of said Association, in the general public interest, by direction of the President and of the Executive Committee of said Association.

STATEMENT OF THE CASE.

The appellant is a common and contract carrier of freight by motor vehicle over public highways in Massachusetts and New Hampshire, with terminals in both States. It holds common and contract carrier certificates under Chapter 106, Laws of 1933 of New Hampshire. Approximately 99 per cent of its business, is interstate (R. 1).

Said Chapter 106 in part provides as follows:

> "1. Declaration of Policy. The business of operating motor vehicles transporting property for hire on the highways of this state affects the interests of the public. The rapid increase in the number of motor vehicles so operated, and the fact that they are not sufficiently regulated, have increased the dangers and hazards on public highways, and regulation of common carriers and contract carriers as hereinafter defined is necessary to the end that highways may be rendered safer for the use of the general public; that the use of the highways for the transportation of property for the hire may be restricted to the extent required by the necessity and convenience of the shipper and receivers of freight, and that the various transportation agencies of the state may be correlated so that public highways may serve the best interest of the general public.
>
> * * *
>
> "8. Hours of Service. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the high-

ways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been on duty more than sixteen hours in the aggregate in any twenty-four hour period, and when the driver has been on duty sixteen hours in any twenty-four hour period it shall be unlawful for him to operate on the highways of this state until he shall have had at least ten consecutive hours off duty. Periods of release from duty herein required shall be given at such place and under such circumstances that rest and relaxation from the strain of the duties of the employment may be obtained. No period off duty shall be deemed to break the continuity of service unless it be for at least three consecutive hours at a place where there is opportunity for a rest. In case of an unforeseen emergency the driver or chauffeur may complete his run or tour of duty if such run or tour of duty, but for the delay caused by such emergency, would reasonably have been completed without a violation of this section. Provided, however, that the provisions of this section shall not apply to trucks while under the control of two licensed operators. The commission shall have authority to enforce the provisions of this section."

"3. Contract Carrier Registration. The term contract carrier as used in this act shall include every person, firm or corporation transporting property for hire by motor vehicle on any public way in this state, other than common carriers, those transporting products of their own manufacture or labor, and those exempted in section 4 of this act. * * *

"4. Exemptions. There shall be exempted from the provisions of this act: I. Motor vehicles not principally engaged in the transportation of property for hire.

II. Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period. * * *"

On April 13, 1937 the New Hampshire Public Service Commission issued to the appellant an order to show cause why its certificates, aforesaid, should not be suspended or revoked by reason of alleged violations of the statute under which they were issued. (R. 1.) At the hearing it appeared that employees of the appellant, engaged in driving appellant's trucks, were on duty in several instances for an elapsed time greater than 12 hours of continuous service. (R. 1 and 2.) The Commission, by report and order, found that the appellant had violated the statute, and ordered that all registration certificates issued by the New Hampshire Commission to the appellant "to lawfully transport property for hire in motor vehicles between points within this state (New Hampshire)" be suspended for five days. (R. 2 and 23-24.) In all operations upon which such alleged violations of the statute occurred, the appellant carried both interstate and intrastate shipments. (R. 2.) The appellant appealed from the Commission to the Supreme Court of New Hampshire (R. 2 and 24-25). That Court sustained the Commission's order on June 7, 1938, and on June 21, 1938 denied a motion for rehearing (R. 2-2 and 26-38). Thereupon appeal was taken to this Court and duly allowed (R. 24-25).

The Motor Carrier Act of 1935, 49 Stat. L. 546, provides in part as follows:

"SEC. 204. (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express uniform systems of ac-

counts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"SECTION 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

The alleged errors of the court below as assigned by the appellant are as follows:

"1. The Supreme Court of the State of New Hampshire erred in its decision in the above entitled cause in holding that sections 3, 4 and 8 of Chapter 106 as amended by Chapter 169 of the New Hampshire Session Laws of 1933 do not deny to this appellant the equal protection of the laws as guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

"2. The Supreme Court of the State of New Hampshire erred in its decision in the above entitled cause in holding that sections 8 and 11 of Chapter 106 as amended by Chapter 169 of the New Hampshire Session Laws of 1933, as applied to this appellant's operations in interstate commerce, were not superseded, and rendered void by the enactment of section 304a of title 49 of the United States Code."

SUMMARY OF ARGUMENT.

1. The Supreme Court of New Hampshire did not Err in Holding that the New Hampshire Statute Does not Deprive Appellant of the Equal Protection of the Laws.

2. The Supreme Court of New Hampshire did not Err in Holding that the Applicable Provision of the New Hampshire Statute Had Not Been Superseded.

The field covered by the New Hampshire statute had not been occupied by the Federal government at the time of the operations penalized by the order of the New Hampshire Commission.

The New Hampshire Statute is not a regulation of interstate commerce.

A State law enacted in the exercise of the police power may be held superseded by a Federal statute only to the extent that such law interferes with or is contrary to the Federal statute.

Congress in the Motor Carrier Act has established no standards for the government of the Interstate Commerce Commission in the promulgation of regulations to displace State police laws.

Public highway are instrumentalities of government; and State laws made to secure their preservation and safe use may not be destroyed by Congress.

The authority granted to the Interstate Commerce Commission in said Section 204(a) was not designed to empower the Commission to displace State police regulations established for the protection of the highways, and of persons and property thereon.

Appellant's construction of the Motor Carrier Act would deprive the States of power to protect public safety on the highways, and would convert the United States District Courts into petty police tribunals.

Acts which violate Federal regulations governing the operation of interstate motor carriers may be punishable under both Federal and State laws.

ARGUMENT.

1. The Supreme Court of New Hampshire did not Err in Holding that the New Hampshire Statute Does not Deprive Appellant of the Equal Protection of the Laws.

The first alleged error specified by the appellant is that the court below erred in holding that the exemption provisions of the New Hampshire statute do not operate to deny to the appellant the equal protection of the laws.

We believe that these exemption provisions are clearly valid under various decisions of this court which have been cited in the brief filed for the State of New Hampshire. We concur in the discussion of said first alleged error contained in that brief, and do not seek to add anything thereto.

2. The Supreme Court of New Hampshire did not Err in Holding that the Applicable Provision of the New Hampshire Statute Had Not Been Superseded.

The field covered by the New Hampshire Statute had not been occupied by the Federal government at the time of the operations penalized by the order of the New Hampshire Commission.

The Motor Carrier Act of 1935 itself imposed no limitation of hours of labor of employees. Section 204(a) of the Act provides only that the Interstate Commerce Commission "may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment."

The mere conference of this power upon the Interstate Commerce Commission, in the absence of action by the Commission, does not affect the power of a State to enact legislation deemed by it to be necessary for the protection of its citizens. *Missouri Pacific Railway* v. *Larabee Mills Co.*, 211 U. S. 612, 623; *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Commission*, 297 U. S. 471.

It is not claimed that any regulation of the Interstate Commerce Commission, made under the authority of Section 204(a), was in effect at the time of the operations which have been penalized by the order of the New Hamp-

shire Commission. There is nothing in the printed record touching this matter, except the reference in the opinion of the Supreme Court of New Hampshire to the order of the Interstate Commerce Commission made in *Maximum Hours of Service of Motor Carrier Employees*, 3 I. C. C. Motor Carrier Reports 690. That order was originally made to become effective July 1, 1938, but the effective date has been from time to time postponed, so that it now stands as December 1, 1938.

It will thus be seen that this case falls clearly within the rule of the *Larabee Mills case* and the *Northwestern Bell Telephone Co. case*, cited above.

Furthermore the Motor Carrier Act of 1935 itself supplies evidence to the effect that Congress did not design to exclude State regulation of hours of service, pending further legislation by Congress.

Section 202(c) explicitly provides that nothing in the Act shall be construed to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways. Section 216(e) reiterates the provision as respects intrastate rates, and Section 205(a) and (g) provides for cooperation between the Interstate Commerce Commission and State commissions, and gives the representatives of the State boards a part in the administration of the Act. These provisions are significant because they show a solicitude for all practicable preservation of State powers which is quite inconsistent with an intent to strike down State regulations designed for the protection of the public safety without the provision of substitutes therefor.

There is, however, a very significant additional provision bearing directly upon this very matter of hours of service. Having provided in Section 204(a) that the Interstate Commerce Commission "*may* establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees and safety of operation and equipment," the Congress included this further provision:

"SEC. 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

At the time the Motor Carrier Act was passed 43 State statutes were in effect respecting the matter of hours of service of employees, as appears from the report of the Interstate Commerce Commission in *Ex Parte MC-2*, 3 I. C. C. Motor Carrier Cases, 665,683. Congress knew this. It apparently felt that Federal regulation in the same field might or might not be necessary, but it was uncertain what regulations, if any, should be imposed. Hence, while undertaking to grant power to the Commission, as provided in Section 204(a), it did not require exercise of that power, and did not undertake to prescribe standards to which the Commission should conform such regulations as it might promulgate; and it left it to the Commission either to act, without the establishment of standards by Congress, or to report back to Congress that no need for action existed, or to recommend further legislation.

The appellant's contention that the provisions of Section 204(a) were designed to effect an exclusive immediate occupation of the field of regulation as respects "qualifications and maximum hours of service of employees, and safety of operation and equipment" would leave no room for the assignment of an effective purpose to the provision of Section 225 as respects the same matters. Such a construction is not permissible.

"No rule of statutory construction has been more definitely stated or more often repeated than the cardi-

nal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, Sec. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783." (*Ex Parte Public National Bank,* 278 U. S. 101, 104, *Ginsburg and Son* v. *Popkin,* 285 U. S. 204, 208.)

The appellant, in support of this contention, relies upon *Northern Pacific Railway* v. *State of Washington,* (222 U. S. 370). In that case this Court held that the enactment of the Hours of Service Act of March 4, 1907, operated to exclude State regulation of hours of service even during the year for which the effect of the Act was postponed. The Hours of Service Act, however, differed in a very marked way from the Motor Carrier Act of 1935. The earlier statute, by its own provisions, determined the limitation of hours, and prescribed when they should become effective. Examination of the statute, read in the light of the report of the House Interstate and Foreign Commerce Committee, which reported the bill, showed that it was the intent of the Act to leave hours of service unlimited till the effective date named in the statute. On this point the Court said:

"In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision, if it was contemplated that the prohibitions of state laws should apply in the meantime. * * * In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act,—a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which caused it to be enacted. Finally, the convictions which arise from the fact of the postponement are made plain by a report on the bill, made to the House of Representatives by the Committee on Interstate and Foreign Commerce, wherein

it was said (Report No. 7641), dated February 16, 1907, p. 6:

> 'Owing to the probable necessity of changing in some instances division points, entailing the removal of employees, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after the approval.' " (*Northern Pacific Railway* v. *Washington*, 222 U. S. 379)

After the Congress had thus legislated prescribing the limitation of hours, and the period of postponement of such limitation, the State of Washington enacted a similar statute to become effective without delay. It was upon this state of facts that this court held the State act repugnant to the Federal Act, and for that reason invalid. In that particular case the conflict in purpose between the Federal statute and the State statute was clear.

> "The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the state must be answered by a judgment upon the particular case." (*Penn R. Co.* v. *Public Service Commission*, 250 U. S. 566, 569.)

In the particular case now before the Court, the statute itself, in contrast to the Hours of Service statute, makes no limitation of hours, and contains no provision directing action by the Commission. As to hours of service, Section 204(a) undertakes only to grant authority to the Commission to establish regulations when, as and if it shall deem regulations desirable. The *Larabee Mills case*, and the *Northwestern Bell Telephone Company case*, just cited, establish very clearly that such an enactment is not an occupation of the regulatory field which operates to exclude the exercise of State power.

The New Hampshire Statute is not a regulation of Interstate Commerce.

Neither the New Hampshire statute, nor the order of the New Hampshire Commission penalizing a violation thereof constitutes a regulation of interstate commerce; and there is no conflict between either and the Motor Carrier Act of 1935. The distinction between the two statutes is clearly pointed out in the report of the New Hampshire Commission as follows:

> "It is to be noted that the Federal statute grants authority to fix the maximum hours of service of all employees. The State law does not attempt to fix the maximum hours of service of any employees, but makes it unlawful to operate on the State's highways after a 12-hour period on duty. There is nothing in the State Law to prevent a driver working in a warehouse after a 12-tour tour of duty as only operation on the highway is restricted.
>
> "The purpose of the two provisions differ widely. Congress acted on that matter over which it clearly has authority—interstate commerce. The thing to be protected is that which is transported. The Federal Act does not mention highway safety generally, but restricts the provisions to safety of operation and equipment of vehicles engaged in interstate commerce. The State law is designed under the police powers of the State to protect the lives and property of all those who use its highways." (R. 9)

The Federal statute looks only towards a proper regulation of the hours of service of employees generally, and towards safeguarding persons and property transported. The New Hampshire statute looks towards protecting the lives and property of all who use the highways. It is a police law and not a regulation of commerce.

In sustaining an Alabama statute which forbade operation of a train in Alabama by one who had not upon examination proved his qualification and obtained a State license, this Court said:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." (*Smith* v. *Alabama*, 124 U. S. 465)

This Court has sustained State statutes forbidding the operation of trains on Sunday, (*Hennington* v. *Georgia*, 163 U. S. 299), regulating the heating of passenger cars in all railroad trains (*N. Y., N. H. & Hartford R. Co.* v. *New York*, 165 U. S. 620), forbidding the transportation of persons to infected areas (*Compagnie Francais* v. *Board of Health*, 186 U. S. 380,) and requiring a certain number of interstate trains to stop daily at towns of a given population (*L. S. and M. S. R. Co.* v. *Ohio*, 173 U. S. 285).

In *South Covington and Cincinnati Street Rwy. Co.* v. *Covington*, 235 U. S. 537, this Court, holding invalid certain sections of a city ordinance, for reasons stated, said:

"In numerous instances this Court has sustained local enactments, passed in the exercise of the police power of the state, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given much consideration in the Minnesota Rate Cases (Simpson v. Shephard, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729), and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce * * * In the light of the principles settled and declared, the various provisions of this ordinance must be examined. That embodied in Secs. 1 and 6 makes it unlawful for the company * * * We

think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati and the manner of loading them when there * * * There are other parts of the ordinance which we are of opinion are within the authority of the state, and proper subject-matter for its regulation; at least, until the Federal authority is exerted. These are the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless a rail or barrier be provided, separating the motorman from the balance of the front platform, as well as those provisions with reference to the requirement to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands." (*South Covington and Cincinnati Street Rwy. Co.* v. *Covington*, 235 U. S. 546)

In *South Covington and Cincinnati Street Railway* v. *Kentucky*, 252 U. S. 399, sustaining the separate coach law of Kentucky in its application to interstate cars operated between Ohio and Kentucky, the Court referred to the case just cited, and said:

"The cited case points out the equal necessity, under our system of government, to preserve the power of the states within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty, and an interurban railroad company deriving its powers from the state, and subject to obligations under the laws of the state, should not be permitted to exercise the powers given by the state, and escape its obligations to the state, under the circumstances presented by this record, by running its coaches beyond the state lines. (*South Covington and Cincinnati Rwy. Co.* v. *Kentucky*, 252 U. S. 404)

A State law enacted in the exercise of the police power may be held superseded by a Federal statute only to the extent that such law interferes with or is contrary to the Federal statute.

The basis upon which State laws, enacted in the exercise of a reserved power may sometimes be held ineffective was stated in *Gibbons* v. *Ogden,* 9 Wheaton 1, as follows:

> "The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." (*Gibbons* v. *Ogden,* 9 Wheaton 211.)

The cases which illustrate application of this principle were reviewed in the *Minnesota Rate Cases,* 230 U. S. 352, and the applicable rule was stated as follows:

> "Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and for this purpose and

> to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible." (*Minnesota Rate Cases,* 230 U. S. 352)

It will be noted that the Court, in recognizing the power of Congress to supersede State statutes enacted in the exercise of a reserved power, indicates that this may be done only in cases where necessary for the accomplishment of some constitutional purpose, and that such power goes no further than the "conviction of national need" entertained by the Congress. Congress alone holds power to judge of the necessity for striking down State legislation; and that power must be exercised by it. The power to strike down goes no further than the "conviction of national need," manifested by the Congress.

Congress may determine what state of facts constitute the necessity before which State laws shall give way, but it must be found, in the manner provided by Congress, that the facts exist which Congress has declared to constitute necessity. An application of this principle was made in *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway,* 281 U. S. 412. In that case the United States District Court had enjoined rates prescribed by the North Dakota Commission. No finding that the rates constituted an undue discrimination against interstate commerce, in violation of Section 13 of the Interstate Commerce Act, had been made by the Interstate Commerce Commission. This Court set the injunction aside because of the lack of a finding establishing a violation of the standard prescribed by Congress. In its opinion the Court cited the *Minnesota Rate Cases,* 230 U. S. 352, where the finding required by the statute, applicable in that case, had not been made, and the State law had been sustained, and also the *Shreveport case,* 234 U. S. 342, where a contrary situation existed, and the State law was held no longer effective. The Court said:

"What was lacking in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, had been supplied in the Shreveport Case (234 U. S. 342, 15 L. ed. 1341, 34 Sup. Ct. Rep. 833). There, the Interstate Commerce Commission had found that there was an unjust discrimination arising out of the relation of intrastate rates, maintained under state authority, to interstate rates which had been upheld as reasonable. The court decided that Congress in exercising its constitutional authority, could correct the evil of this discrimination against interstate commerce, and that in so doing Congress was entitled to secure the maintenance of its own standard of interstate rates. Having this power, Congress could provide for its exercise through the aid of a subordinate body. The removal of the discrimination was within the authority granted to the Interstate Commerce Commission, and the decision rested upon the ground that this authority has been exercised." (*Bd. of R. Comrs.* v. *Great Northern R. Co.*, 281 U. S. 424)

"It is said that the interlocutory injunction, granted below, was in aid of the proceedings pending before the Interstate Commerce Commission. But the injunction necessarily has the effect of preventing the state from enforcing the rates it has prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. A judicial restraint of the enforcement of intrastate rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the state to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the state authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created. Congress forbids the unjust discrimination through the fixing of intrastate rates but entrusts the appropriate enforce-

ment of its prohibition primarily to its administrative agency." (*Bd. of R. Comrs.* v. *Great Northern R. Co.*, 281 U. S. 430)

Again in *Florida* v. *United States*, 288 U. S. 193 this Court held an order of the Interstate Commerce Commission prescribing intrastate rates invalid because findings necessary under the Act to establish the jurisdiction of the Commission to make such order had not been made. In its opinion the Court said:

> "The question in the present cases, then, is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear. Illinois C. R. Co. v. State Public Utilities Commission, 245 U. S. 493." (*Florida* v. *United States*, 282 U. S. 211.)

Congress in the Motor Carrier Act has established no standards for the government of the Interstate Commerce Commission in the promulgation of regulations to displace State police laws.

Congress can not delegate the power to promulgate regulations to have the force of law without establishing standards to which such regulations shall be made to conform.

This question of the delegation of legislative power was very fully considered by this Court in a recent case; and the applicable authorities from the beginning of our national history were reviewed. It is sufficient to refer to that case, which was *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Acting under Section 9(c) of the National Industrial Recovery Act, the President had prohibited the interstate transportation of certain petroleum and petroleum products. Said section provided in part as follows:

> "(c) The President is authorized to prohibit the transportation in interstate and foreign commerce of

petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage from any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State."

Having reviewed the applicable cases the court said:

"Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that Sec. 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

"If Sec. 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government." (293 U. S. 430)

In the Motor Carrier Act the Congress has declared no policy, and established no standards, as respects requirements to be imposed to govern "qualifications and maximum hours of service of employees, and safety of operation and equipment."

In this respect the Motor Carrier Act is in direct contrast to acts of Congress designed to establish regulations for the government of rail carriers.

In the Hours of Service Act of March 4, 1907, 34 Stat. L. 1415, a limitation of hours was declared by the Act.

In the Safety Appliance Act of March 2, 1893, 97 Stat. L. 531, the standards imposed were set forth in the Act. The provision in Section 5 authorizing certification by the American Railway Association to the Interstate Commerce Commission of the standard height of drawbars was claimed to be a departure from this principle; but it was held otherwise in *St. L. I. M. and S. R. R.* v. *Taylor*, 210 U. S. 28. Uniformity in height was required by the statute. That was the standard established. What the height should be was a mere detail left to be determined and announced by the Commission. That this was the principle upon which the decision rested is shown by the cases cited by the court as decisive. These were *Union Bridge Co.* v. *United States*, 204 U. S. 364, and *Buttfield* v. *Stranahan*, 192 U. S. 470.

The *Union Bridge Co. case* involved a statute in which Congress empowered the Secretary of War to require removal of any structure in any navigable stream found by him to constitute an "unreasonable obstruction" to free navigation "on account of insufficient heighth, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span." These tests were held sufficiently definite standards for the government of the Secretary of War in enforcing the rule of free navigation declared by Congress.

Buttfield v. *Stranahan* was declared by the Court to be "completely in point." In that case in Section I of the Act, the Congress declared the character of tea, the importation of which was made unlawful, and by Section 3 gave to the Secretary of the Treasury the mere executive duty to effectuate the policy declared in the statute. (192 U. S. 496.)

In the act of April 14, 1910, to Supplement the Safety Appliance Act, 36 Stat. L. 298, the Congress in Section 2 prescribed the character of appliances with which cars should be equipped, and in Section 3 provided that the Com-

mission, after hearing, should designate "the number, dimensions, location and manner of application of the appliances provided for by Section 2."

In the National Labor Relations Act of 1935, 49 Stat. L. 449, Congress defined the unfair labor practices made unlawful by the Act, and it was the standards thus established by Congress which the Labor Board was empowered to enforce. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 47.

What the Congress attempted to do in Section 204(a) of the Motor Carrier Act is similar in all respects to what was attempted by the legislature of Iowa in the statute held unconstitutional by the Supreme Court of that State in *Goodlove* v. *Logan*, 217 Ia. 98, 251 N. W. 39. That statute provided:

> "The state highway commission shall, for the protection of the highways and the safety of the traffic thereon, establish rules and regulations and issue orders relative to the use of the primary roads or any part thereof and of those portions of extensions of primary roads built and maintained by the state within cities and towns. Such rules and regulations may, where the matter is not otherwise covered by statute, relate to * * * the stopping of vehicles on the paved portion of the roadway, and the stopping of vehicles on any portion of primary roads for service at wayside markets or filling stations. * * *"

Carefully reviewing State decisions, and decisions of this court bearing upon the question involved, the Supreme Court of Iowa said:

> "If the Legislature had a right to pass section 5066, granting to the highway commission the authority to adopt rules and regulations governing the stopping of cars upon a paved highway, the Legislature can also empower the highway commission to pass rules and regulations governing the speed and right of way, and all duties of automobile drivers. * * * Thus, it seems to us that the Legislature under Code Sec. 5066 has left to the highway commission first to say whether there

shall be any law, and, second, what that law shall be. This is a delegation of legislative power, and is unconstitutional." (*Goodlove* v. *Logan,* 251 N. W. 43)

See also *Ex Parte McLain,* 190 Calif. 376, 212 Pac. 620, where a statute authorizing a highway commission to fix the maximum speed of travel across highway bridges was held unconstitutional on like grounds.

In *State* v. *Larson,* 10 N. J. Miscl. 384, 160 Atl. 556, the New Jersey Court of Oyer and Terminer held unconstitutional an act which undertook to authorize an aviation commission of that State to "establish and revise from time to time air traffic rules for the navigation, protection and identification of aircraft which shall conform to and coincide with, insofar as is practicable (the provisions of Federal statutes) * * *," and provided further, "It may encourage and effect, insofar as is practicable, uniform field rules for airports." The Court said:

> "Our form of government, both federal and state, is based upon the fundamental concept of the separation of the powers, legislative, executive, and judicial. * * * But, while the establishment of principles or standards of conduct is the essential function of the lawmaking body, which cannot be delegated, the application of those principles or standards to facts as they arise, and the determination as to whether or not those facts exist, is a function of law enforcement, which can therefore be delegated to an administrative body. This distinction is well brought out in the leading case of Field v. Clark, 143 U. S. 649, 12 S. Ct. 495, 505, 36 L. Ed. 294, where the court says: 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.' See further the comparatively recent case of Hampton, Jr. & Co. v. U. S., 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624, which collates the authorities generally in this regard. Accordingly, Congress in exercising legislative control over intrastate carriers by the fixing of general principles can yet

delegate fact-finding and law-enforcing, i. e., rate making, power to the Interstate Commerce Commission. Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452, 30 S. Ct. 155, 54 L. Ed. 280. So again the state of New Jersey can delegate rate-making power to the State Public Utilities Commission. W. J. & S. Railroad v. Board of Public Utility Commissioners, 87 N. J. Law, 170, 94 A. 57. A delegation of power over transportation by air can, of course, be made similar to that over transportation by land or water. But this is exactly what the State Aviation Act fails to do. As seen above, it fixes no criterion whatever to be adhered to by the state aviation commission in establishing its regulations for 'uniform field rules.' In authorizing such regulations, it therefore violates the fundamental concept of our constitutional law as to the separation of the powers."

Public highways are instrumentalities of government; and State laws made to secure their preservation and safe use may not be destroyed by Congress.

The duty to protect its citizens is a paramount duty of every civilized state. The power to provide such protection is among the first of those preserved to the State by the 10th amendment. The power to maintain their instrumentalities of government is another of those powers reserved under the constitution.

This latter power is not subject to destruction by Congress. The Federal government may not levy taxes on such instrumentalities lest they be crippled or destroyed.

"The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme: but the States within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved,' are as independent of the General Government as that government within its sphere is independent of the States. * * * Such being the sepa-

rate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the General Government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operation of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax." (*Buffington* v. *Day*, 78 U. S. 113)

The principle involved was applied in *Ambrosini* v. *United States*, 187 U. S. 1, to bonds required to be given by licensees as prerequisites to the issuance of liquor licenses. It was held that such bonds were instrumentalities of the State government, and not subject to the requirement of the Federal revenue law. In its opinion the court said:

"The general principle is that, as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the general government. It rests on the law of self-preservation, for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter." (*Ambrosini* v. *United States*, 187 U. S. 1, 6.)

Public highways are indispensable instrumentalities of government in every civilized State. Without them the most obvious functions of government could not be performed. It is not too much to say that without highways society as we know it could not exist, and the State itself could not exist.

Being, then, indispensable instrumentalities of government, the States not only have the right to maintain highways, but they have the right to make laws for their preservation, and to enable their safe use for the public purposes for which they are maintained.

This is not to say that Congress may not enact laws which it shall find to be necessary to protect the freedom of movement of interstate commerce upon the highways, and otherwise to regulate such commerce; but such laws must stop short of destruction of the right of a State to maintain its highways, and to keep them safe.

The results which might flow from sustaining the contention of the appellant respecting the effect of the enactment of the Motor Carrier Act, 1935, were pointed out in the report of the New Hampshire Commission as follows:

> "If the argument of the respondent is sound, then as the Federal statute provides for reasonable requirements as to 'safety of operation and equipment' interstate carriers are now free to run without lights, brakes, etc., to run through red lights, ignore all local and State speed restrictions, pass cars on hills, and violate all other State laws and City and Town ordinances governing safety of operation and equipment." (R. 9)

The authority granted to the Interstate Commerce Commission in said Section 204(a) was not designed to empower the Commission to displace State police regulations established for the protection of the highways, and of persons and property thereon.

Displacement of State police regulations governing use of the highways is not necessary to a proper regulation of interstate commerce moving upon such highways; and properly construed the Motor Carrier Act does not contemplate any such displacement.

Nothing except the clearest language would be taken to express an intent to displace the ordinary police laws of the States within which interstate carriers may operate.

Such displacement of local laws in practical effect would free interstate carriers from all effective police restraint.

No rules which might be substituted,—if such substitution may constitutionally be made,—to be enforced through the Bureau of Motor Carriers of the Interstate Commerce Commission by prosecutions in the Federal courts would be an adequate substitute for local laws enforced by local officials in the local courts.

If it be true that even the laws of a State enacted for the preservation of public safety upon the highways must yield to the rule expressed in *Gibbons* v. *Ogden* and in the *Shreveport case*, cited *supra*, yet Congress is by the constitution obligated to refrain from unnecessarily destroying any of the reserved powers of the States. Every statute must be construed in the light of this constitutional restraint. Intent on the part of Congress to observe such restraint is always presumed.

Accordingly it is a settled rule in the construction of Federal statutes enacted under the commerce clause "that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." (*Illinois Central R. R.* v. *Public Utilities Commission*, 245 U. S. 493, 510 and cited cases)

Especially is this rule applicable in cases where State laws designed for the protection of the public safety are involved. The general rule was succinctly stated in the opinion of the dissenting Justices in *Leisy* v. *Hardin*, 135 U. S. 100, as follows:

> "The protection of the safety, the health, the morals, the good order and the general welfare of the people is the chief end of government. *Salus populi suprema lex.* The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments. The Constitution of the United States and the laws made in pur-

suance thereof being the supreme law of the land, all statutes of a State must, of course, give way, so far as they are repugnant to the National Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the Congress of the United States, to subordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce." (135 U. S. 100)

Said Section 204(a) of the Motor Carrier Act is open to two possible constructions. One is that placed upon it by the New Hampshire Commission, which would attribute to the Act an intent to restrict the authority granted to the making of rules for the protection of vehicles themselves, of their operators and of passengers and cargoes. The other construction would be that contended for by the appellant which would attribute to the Act an intent to authorize the making of regulations designed to protect the lives and property of all those who use the highways, and the highways themselves, so far as highways might be affected by improper driving and operation. Unsafe operation obviously would include the overloading of vehicles.

There is nothing in the Motor Carrier Act to indicate an intent to impose regulation for the purpose of protecting the safety of the general public. In the declaration of policy, in Section 202(a), there is nothing respecting safety. Other provisions of the Act make it evident that preservation of the public safety and of the highways were not among the purposes aimed at in the Act. Furthermore the proviso included in Section 208(a) and the similar proviso in Section 209(b) prevents the Interstate Commerce Commission from limiting the number of vehicles which a carrier may operate once a certificate or permit has been granted. The proviso in Section 208(a) is as follows:

"* * * *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the

routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

In view of this express limitation upon the Commission's power, in view of the complete absence of any provision in the Act indicating an intent on the part of Congress that the regulation provided should be directed towards protecting the safety of persons and property upon the highways, and towards protecting the highways themselves, and in view of the serious consequences which would result from a destruction of the police power of a State to afford such protection, the construction contended for by the appellant can not be accepted.

If Congress had in mind any legislation affecting State police powers in that field, it determined to postpone enactment of the same until the Commission, under the provisions of Section 225, might report to the Congress as to the need for Federal regulation.

What the court said in *South Carolina Highway Commission* v. *Barnwell Bros.*, Supreme Court Advance Opinions, L. ed. Vol. 82, page 469, is applicable in this case. In that case it was contended that a statute of South Carolina limiting the size and weight of motor trucks operating upon the highways had been superseded by the Motor Carrier Act of 1935. In its opinion, sustaining the validity of the statute, this Court said:

"While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412, and Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. * * * Few sub-

jects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against against their abuse. * * * Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." (*South Carolina State Highway Department* v. *Barnwell Brothers*, Supreme Court Advance Opinions, Vol. 82, page 469.)

If the States are exercising their reserved powers to regulate carriers in these matters to the substantial injury of interstate commerce, so that some limitation of that exercise is thought by the Commission to be necessary, report can be made under Section 225, and Congress can take such considered action as is within its constitutional power.

Appellant's construction of the Motor Carrier Act would deprive the States of power to protect public safety on the highways, and would convert the United States District Courts into petty police tribunals.

The extent to which the destruction of the police power of the States, in so far as they apply to interstate motor carriers, would be carried by the construction of Section 204 (a) contended for by the appellant may be indicated by directing attention briefly to a few of the rules and regulations which have been promulgated by the Interstate Commerce Commission under Section 204 (a).

We accordingly quote briefly from the reports of the Commission and from such rules and regulations.

In *Motor Carrier Safety Regulations, Ex Parte* MC-4, 1 I. C. C. Motor Carrier Cases, 1, 4, 8-9, the Commission said:

> "The task of establishing highway safety regulations on a national scale is not an easy or a simple one. Hitherto, the several States have exercised jurisdiction over these matters, and a very pronounced lack of uniformity has been the unavoidable result.
>
> "A few States have built up, through the years, regulatory organizations which are able to exercise close control over carriers, drivers, and equipment, basing their activities upon detailed laws or regulations as to examinations, mechanical specifications and inspection, and the like. Other States have more general requirements, with limited funds and personnel to make them effective. Still others exert little or no control over motor-carrier operations from a safety standpoint. * * * The basic rule with respect to speed (rule 7) is contained in nearly all State speed laws. * * * We are of the opinion that no completely satisfactory solution has yet been found for the problem of controlling motor-vehicle speed upon the open highway. Accordingly, after careful study of all the evidence submitted, and in the absence of adequate data or unified opinion among competent authorities, we have been impelled to refrain for the present from specifying a limit in miles-per-hour speed. The subject will receive our closest attention in the light of our continuing experience. The

'basic rule' remains: Speed at no time should be greater than is reasonable or prudent under the existing conditions.

"Rule 13 omits a specified distance to be maintained between vehicles moving in the same direction, in favor of a more reasonable rule requiring drivers to keep a sufficient distance behind a preceding vehicle so as not to interfere with overtaking traffic."

The following quotations are from the rules and regulations contained in the order made in the case just cited, attached to and a part of the Commission's report—

"RECKLESS DRIVING.

4. No motor vehicle shall be driven recklessly, or so as to endanger life, limb, or property.

* * * * * * * * *

6. No driver shall go on duty while under the influence of, nor drink while on duty, any alcoholic liquor or beverage; nor shall he knowingly be permitted so to do.

SPEED.

7. No motor vehicle shall be driven at a speed greater than is reasonable and prudent, having due regard to weather, traffic, intersections, width and character of the roadway, type of motor vehicle, and any other conditions then existing; but in no event shall a motor vehicle be driven in or through any State, legal subdivision thereof, or the District of Columbia at a speed greater than that permitted by such State, legal subdivision thereof, or the District of Columbia.

* * * * * * * * *

DRIVING.

12. Every motor vehicle shall be driven as far to the right side of the traveled portion of the highway as is practicable.

13. Sufficient space shall be maintained, whenever conditions permit, between vehicles proceeding in the same direction so that an overtaking vehicle may enter and occupy such space without danger. * * *

14. Every motor vehicle transporting passengers, high explosives, or poisonous or compressed inflam-

mable gases, and every motor vehicle use for the transportation of inflammable or corrosive liquids in bulk, whether loaded or empty, shall, upon approaching any railroad grade crossing, be brought to a full stop within 50 feet, but not less than 10 feet, from the nearest rail of such railroad grade crossing, and shall not proceed until * * *

18. No motor vehicle shall be driven past a vehicle or vehicles proceeding in the same direction, unless there is ample visible space ahead to do so without endangering any other user of the highway; if necessary, an audible signal of intention to pass shall be sounded. * * *

19. The speed of a motor vehicle shall not be increased to prevent being overtaken by another vehicle attempting to pass.

20. No motor vehicle shall be driven upon a down grade with gears in neutral or clutch disengaged.

21. Any motor vehicle when meeting or overtaking any school or other bus discharging or taking on passengers shall proceed with extreme caution and only if the course ahead is known to be clear.

STOPPING.

22. No motor vehicle shall be stopped, parked, or left standing, whether attended or unattended, upon the traveled portion of any highway outside of a business or residence district, when it is practicable to stop, park, or leave the motor vehicle off the traveled portion of such highway. * * *

* * * * * * * * * *

25. On every motor vehicle operated upon the highways, all lamps required by the regulations of the Commission shall be lighted during the period from one-half hour after sunset to one-half hour before sunrise, and * * *

IN CASE OF ACCIDENT.

32. The driver of any motor vehicle involved in an accident resulting in death, personal injury, or property damage shall forthwith stop at the scene of the accident and remain there until he shall have (a) rendered all possible assistance to injured persons; and (b) given

to any person demanding the same his name and address * * *

SECTION A—LIGHTING DEVICES AND REFLECTORS.

(1) (a) On every bus or truck whatever its size, there shall be the following lighting devices and reflectors. * * *

SECTION B—BRAKES.

(1) Every bus, truck, and truck tractor shall be equipped with brakes adequate to control the movement of, and to stop and to hold such vehicle, including two separate means of applying the brakes * * *."

The foregoing regulations were issued by order of the Commission in December 23, 1936 to become effective July 1, 1937.

The quotations following are from the report of the Commission in Ex Parte No. MC-2, *In the Matter of Maximum Hours of Service of Motor Carrier Employees,* 3 I. C. C. Motor Carrier Cases, 665, and from the order of the Commission, upon rehearing in that proceeding, which order is reported in 6 I. C. C. Motor Carrier Cases 1,

"STATE LAWS ON MAXIMUM HOURS.

The testimony and exhibits submitted at the hearings disclose that 43 States and the District of Columbia have enacted laws prescribing a maximum limit on the hours of service of drivers of for-hire motor vehicles or granting authority to a State agency to promulgate regulations under which hours of service have been prescribed. * * * The regulations hereinafter set forth prescribe, for the reasons herein indicated, a higher daily maximum of work or driving hours than is laid down in the laws or regulations of 9 of the 43 States. Under the laws of 34 States, however, it is possible to drive or work a daily maximum equal to or in excess of that herein prescribed. * * * In prescribing these regulations we confine them, for reasons previously stated, to maximum hours for drivers of motor vehicles operated by common and contract carriers in the transportation of property or passengers in interstate or

foreign commerce. We desire to make it entirely clear that these regulations are only an initial step. * * * Conditions are rapidly changing in the motor-carrier industry and there may be many factors which will demonstrate that the limits now found reasonable will not be reasonable at some future date. It is also to be borne in mind that we here prescribe only the maximum hours for drivers and not the actual hours. There is nothing to prevent carriers from establishing, either by agreement with their employees or otherwise, lesser hours, as they have frequently done in the past." (3 I. C. C. Motor Carrier Cases, 683, 686.)

"RULE 1

* * * * * * * * * *

(b) The term 'driver' means any individual who drives in transportation in interstate or foreign commerce any motor vehicle as defined in paragraph (a) above. * * *

"RULE 3

(a) No carrier subject to these regulations shall permit or require any driver in his employ to remain on duty, as defined in paragraph (c) of rule 1, for a total of more than 60 hours in any week, as defined in paragraph (e) of rule 1; provided, however, that carriers operating vehicles on every day of the week may permit drivers in their employ to remain on duty for a total of not more than 70 hours in any period of 192 consecutive hours.

(b) No carrier subject to these regulations shall permit or require a driver in his employ to drive or operate a motor vehicle for more than 10 hours in the aggregate in any period of 24 consecutive hours, unless such driver be off duty for 8 consecutive hours during or immediately following the 10 hours aggregate driving and within said period of 24 consecutive hours; provided, however, that two periods of resting or sleeping in a berth, as defined in paragraph (g) of rule 1, may be cumulated to give the aforesaid total of 8 hours off duty.

"RULE 4

No carrier subject to these regulations if himself a driver shall remain on duty or drive or operate for

> longer periods than those prescribed in rule 3 hereof for employed drivers." (6 I. C. C. Motor Carrier Cases 1, 10, 11)

Regulations in *Ex Parte MC-2* were originally issued on December 29, 1937 to become effective July 1, 1938. The effective date of the order, however, was later postponed, and the order was reissued on July 12, 1938, to become effective October 1, 1938. It has since been further postponed, and at the date of the preparation of this brief stood to become effective December 31, 1938.

The appellant's brief contains the following paragraph:

> "In its report of this case below, the Public Service Commission of New Hampshire emphasized the argument that if the appellant's contention was accepted, the field of hours of service in interstate motor transportation would be left unregulated. The answer to this argument is not difficult to suggest, for as Mr. Justice Brandeis said in *Napier* v. *Atlantic Coastline Railroad Co.*, 272 U. S. 605, 613
>
> > 'If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample.' "

The paragraph of the report of the New Hampshire Commission here referred to we have already quoted. It pointed out that if the appellant's construction was accepted, not only would the hours of service of drivers of interstate carriers be left unregulated, but such carriers would be free to ignore all State laws and City and Town ordinances governing safety of operation and equipment. The appellant recognizes that this is true, as it must. The quotations from the reports and orders of the Interstate Commerce Commission which we have heretofore included in this brief indicate that said Commission entertains the view that the appellant's construction is correct. "*Hitherto*", that Commission says in *Motor Carrier Safety Regulations*, cited *supra*, "the several States have exercised jurisdiction over these matters * * *".

Such a construction of the Motor Carrier Act of 1935 is nothing short of staggering. If it is sound, it means that the people of the States may no longer look to their law enforcement officers and to their local courts for protection against lawless actions of interstate motor carriers. They must look to the Interstate Commerce Commission for laws, in the form of regulations, and to the Bureau of Motor Carriers of that Commission for enforcement, and to the Federal courts for the infliction of penalties for violations of such laws as the Interstate Commerce Commission may make.

This prospect is not disturbing, in the view of the appellant, as set forth in its brief. "The Commission's power is ample", the brief asserts, quoting language from an opinion of this court applying to a very different situation.

Law enforcement is considerably more difficult than law making. The single excursion which the Federal government has made into the field of enforcement of police regulations proved pretty conclusively that Federal bureaus can not be depended upon to do work of that character very satisfactorily, and that our Federal courts can not be converted into petty police tribunals without largely impairing their efficiency for the disposition of the character of litigation for which they were designed.

It is unthinkable that Congress ever designed the Motor Carrier Act to receive any such construction as that contended for by the appellant. At least such construction of the Act is doubtful, and must be rejected under well-settled rules of construction.

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware & H. Co.*, 213 U. S. 366, 407, 408. *State of Texas* v. *Eastern R. R. Co.*, 258 U. S. 204, 217.

Acts which violate Federal regulations governing the operation of interstate motor carriers may be punishable under both Federal and State laws.

It is well established that the same act may be an offense against the Federal government and likewise against a State, under Federal and State laws penalizing such act. Criminal prosecutions under both Federal and State prohibition laws have not been uncommon. The validity of State laws under which State prosecutions were maintained for acts likewise prosecuted by the Federal government did not depend upon Section 2 of the 18th Amendment, providing for "concurrent power to enforce this Article (the 18th Amendment) by appropriate legislation." It depended upon the inherent police power of the States preserved to them under the constitution. This was clearly stated by this court in *United States* v. *Lanza*, 260 U. S. 377, and again in *Hebert et al.* v. *Louisiana*, 272 U. S. 312, as follows:

> "To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of country-wide prohibition, state power would be excluded. In effect the 2d section of the 18th Amendment put an end to restrictions upon the state's power arising out of the Federal Constitution, and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the 1st section of the Amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging

to the states, preserved to them by the 10th Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. (260 U. S. 381)

In *United States* v. *Marigold*, 9 Howard 560, the respondent was held liable to prosecution under an Act of Congress for uttering counterfeit coins, notwithstanding the fact that in *Fox* v. *Ohio*, 5 Howard 410, the court had upheld a conviction under an Ohio statute, making the uttering of counterfeit coin unlawful. It was contended that the same act could not be a crime against both Federal and State governments, but the Court said:

> "The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose as assigned by the framers of that instrument of creating and preserving the uniformity and purity of such a standard of value; and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power. * * * With the view of avoiding conflict between the State and federal jurisdictions, this court in the case of *Fox* v. *The State of Ohio* have taken care to point out, that the same act might as to its character and tendencies, and the consequences it involved, constitute offense against both the State and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." (9 Howard 567, 569).

Violation of election laws and forgery are acts which may likewise be offenses against the two sovereignties. *Ex Parte Seibold*, 100 U. S. 390, *Pettibone* v. *United States*, 148 U. S. 209, *Cross* v. *North Carolina*, 132 U. S. 131. In the *Seibold case* the Court said

"As a general rule, it is no doubt expedient and wise that the operations of the State and National Governments should, as far as practicable, be conducted seperately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. * * * Generally, the powers given by the Constitution to the Government of the United States are given over distinct branches of sovereignty from which the State Governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated; that of the State, however being subordinate to that of the United States, whereby all question of precedency is eliminated. * * * It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress had made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with state laws and regulations with the duties of state officers, or with local prejudices. * * * This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time."

CONCLUSION.

The New Hampshire Commission construed Section 204 of the Motor Carrier Act of 1935 as intended to authorize the Commission to promulgate only regulations designed to secure the safety of motor carrier employees, and their vehicles, and the passengers and cargoes transported in interstate commerce. That construction is in harmony with the presumption that Congress has endeavored to guard against "any unnecessary interference with State laws and regulations." Under such construction acts violative of any

valid regulations promulgated under said section may be punished as provided by Federal law, and if violative of the police laws of a State, may likewise be punished in the courts of the State.

In any event, for the various reasons hereinbefore set forth there has been no occupation of the field of hours of service regulation, as respects drivers of vehicles of motor carriers which has operated to supersede New Hampshire laws applicable thereto.

Respectfully submitted,

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December 16, 1938.

SUPREME COURT OF THE UNITED STATES.

No. 295.—October Term, 1938.

H. P. Welch Company, Appellant, vs. The State of New Hampshire. } Appeal from the Supreme Court of the State of New Hampshire.

[January 30, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

A statute of New Hampshire[1] declares unlawful the operation on its roads of motor vehicles for specified transportation by drivers who have been continuously on duty for more than 12 hours. By this appeal we are called on to decide whether, as applied in this case, §§ 3, 4, and 8 are repugnant to the equal protection clause of the Fourteenth Amendment, and whether §§ 8 and 11 were superseded by the federal Motor Carrier Act, 1935, § 204,[2] and regulations prescribed under it by the Interstate Commerce Commission.

The New Hampshire Act declares that the number of motor vehicles operated by carriers for hire has made regulation necessary to the end that its highways may be safer for use by the general public. § 1. It requires common and contract carriers between points within the State to register their trucks with the public service commission. § 2. Contract carriers include those, other than common carriers, who haul for hire by motor vehicle on any road of the State. § 3. Exempted from the challenged regulation are those transporting products of their own manufacture or labor (§ 3), and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town or within 10 miles of its limits or beyond the 10-mile limit on not more than two trips in 30 days. § 4.

Section 8 declares that "It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property

[1] Laws 1933, c. 106 as amended by c. 169.

[2] 49 Stat. 546; 49 U. S. C. § 304.

for hire on the highways of this State when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this State until he shall have had at least eight consecutive hours off duty." Section 11 provides that for violations of the Act the commission shall have authority after notice and hearing, to suspend or revoke any registration certificate.

Appellant is a Massachusetts corporation doing intrastate and interstate business as a common and contract carrier of freight for hire by motor vehicles over public highways in that State and in New Hampshire. Approximately 99 per cent of its business is interstate. It has terminals at Boston in Massachusetts, and at Manchester, Concord, and Claremont in New Hampshire. In 1937 it obtained from the New Hampshire commission registration certificates for 20 trucks. After notice and hearing, the commission, in a decision filed as of December 11, 1937, held appellant had violated the provisions of § 8 and ordered that its certificates be suspended for five days. Appellant appealed to the state supreme court. That court upheld the challenged provisions and dismissed the appeal. 89 N. H. —.

1. Sections 3, 4, and 8 are not repugnant to the equal protection clause. The state court found that the purpose of § 8 is "to protect users of the highways of this State from the danger likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue." Appellant's contention is that the discrimination between drivers of motor carriers for hire subject to § 8 and those exempted by §§ 3 and 4, has no fair or substantial relation to highway safety. It suggests, and we may assume, that the roads of New Hampshire are extensively used for transportation by trucks not regulated by § 8; that drivers of them are just as susceptible to fatigue from long hours of continuous operation as are those operating the trucks used by appellant and other common carriers for hire, and that the dangers attributable to fatigued drivers are the same in one class of service as in another. Appellant has failed to show that, in operations to which § 8 applies, continuous driving for more than 12 hours is not so much more prevalent than in those exempted (§§ 3, 4) as to constitute a reasonable basis for the

differentiation. We are of opinion that, for reasons given above, those stated by the state supreme court in this case and by this Court in *Dixie Ohio Express Co.* v. *Georgia Comm'n*, decided this day, the classification in question does not conflict with the rule of equal protection.

2. As applicable to the violations of the state law found to have been committed by appellant, §§ 8 and 11 were not superseded by the federal Motor Carrier Act, 1935, or the regulations made under it by the Interstate Commerce Commission.

That Act became law August 9, 1935. Under the caption "General Duties and Powers of the Commission", § 204(a) declares: "It shall be the duty of the Commission . . . to regulate" common and contract carriers by "motor vehicle . . . and to that end the Commission may establish reasonable requirements with respect to . . . qualifications and maximum hours of service of employees, and safety of operation and equipment." By order made under authority of that section December 29, 1937, the Commission prescribed regulations as to maximum hours of service of drivers of motor vehicles operated in interstate commerce by common and contract carriers.[3] These regulations were modified July 12, 1938[4] and their effective date has been postponed to January 31, 1939.[5] With exceptions that need not be stated here, they declare that no common carrier shall permit or require any driver to remain on duty for more than 60 hours a week or more than 10 hours in any period of 24 consecutive hours.[6]

Appellant does not suggest that prior to congressional action the State was without power, for protection of persons and property, to regulate use of its roads as provided in § 8, and to enforce obedience in accordance with § 11. *Cooley* v. *Board of Wardens*, 12 How. 299, 320. *Smith* v. *Alabama*, 124 U. S. 465. *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514. The violations for which the state commission suspended appellant's registration certificates occurred after the effective date of the federal Act and before the Interstate Commerce Commission made its order. Without so deciding, we assume, so far as concerns the periods of continuous service condemned by the state commission, that when the federal

[3] 3 M. C. C. 665.

[4] Ex Parte No. MC-2, July 12, 1938.

[5] 5x Parte No. MC-2, December 22, 1938.

[6] Ex parte No. MC-2, July 12, 1938 [Rule 3(a) and (b)].

regulations take effect they will operate to supersede the challenged provisions of the state statute. Then, the sole question is whether Congress intended that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce. Our decisions provide no formula for discovering implied effect of federal statutes upon state measures such as that under consideration. Here, the way is made clear by the language and context considered in connection with existing conditions. Section 204(a) definitely imposes upon the Commission the duty to "regulate" but merely authorizes it to establish reasonable requirements with respect to, inter alia, qualifications and maximum hours of service of employees and safety of operation and equipment. The distinction intended between duty imposed and action permitted is more striking in view of the matters that, along with qualifications and hours of service of drivers, are committed to the discretion of the Commission. They include transportation of baggage and express, uniform systems of accounts, records, and reports, and preservation of records.

The roads belong to the State. There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians, and the like. Unquestionably, reasonable regulation of periods of continuous driving is an appropriate measure. In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. *Mintz* v. *Baldwin*, 289 U. S. 346, 350. The rule applicable is clearly stated in *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 510: "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." We have frequently applied that principle. See e. g. *Reid* v. *Colorado*, 187 U. S. 137, 148. *Missouri Pacific Ry.* v. *Larabee Mills*, 211 U. S. 612, 621 et seq. *Missouri, Kansas & Texas Ry. Co.* v.

Harris, 234 U. S. 412, 418-419. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 139. *N. W. Bell Tel. Co.* v. *Ry. Comm'n*, 297 U. S. 471, 478. *Kelly* v. *Washington*, 302 U. S. 1, 10 et seq. Appellant cites *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370, 378; *Erie R. R. Co.* v. *New York*, 233 U. S. 671; *Oreg.-Washington Co.* v. *Washington*, 270 U. S. 87; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 613; and *Missouri Pacific* v. *Porter*, 273 U. S. 341, 345. In each, the facts differ so widely from those of the case before us that no discussion is required to show that it is not in point.

Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.